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No. 21,887

In the United States Court of Appeals
for the Ninth Circuit

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

CARL SIMPSON BUICK, INC., RESPONDENT

On Petition for Enforcement of an Order of the National Labor Relations Board

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

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BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

JURISDICTION

This case is before the Court upon petition of the National Labor Relations Board pursuant to Section 10(e) of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C. Sec. 151, *et seq.*),[1] for enforcement of its order (R. 86-95),[2]

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[1] The pertinent statutory provisions are reprinted in Appendix B, *infra* pp. 28-30.

[2] References designated "R." are to Volume I of the record as reproduced pursuant to Rule 10 of this Court. References

issued on November 30, 1966, against respondent (hereafter called the Company). The Board's decision and order are reported at 161 NLRB No. 122. As the Board's order is based in part on findings made in a representation proceeding under Section 9 of the Act, the record in the representation proceeding is part of the record before the Court pursuant to Section 9(d). This Court has jurisdiction of the proceedings, the unfair labor practices having occurred at Mountain View, California, within this judicial circuit. No jurisdiction issue is presented.

STATEMENT OF THE CASE

I. The Board's Findings of Fact

The Board found that the Company violated Sections 8(a)(5) and (1) of the Act by refusing to recognize and bargain with a union which had been duly elected and certified as the bargaining representative of an appropriate unit of the Company's employees. The facts underlying the Board's findings are set forth below.

A. *The representation proceeding*

The Company is a new and used car-truck dealer in Mountain View, California. On June 21, 1965, the

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designated "Tr." are to the reporter's transcript of the testimony in the underlying representation proceeding as reproduced in Volume II of the record. References designated "B.X." or "E.X." are to exhibits of the Board and respondent, respectively, submitted in the representation proceeding. Whenever in a series of references a semicolon appears, those references preceding the semicolon are to the Board's findings; those following are to the supporting evidence.

Union [3] filed an election petition seeking to represent a bargaining unit comprised of the Company's salesmen (R. 4). At the pre-election hearing, the Company moved to dismiss the election petition on the ground that the single employer unit was inappropriate. The Company asserted that the only appropriate unit in which the salesmen could be represented was a multiemployer unit consisting of all salesmen employed by the employers in an employer association of which the Company was a member (Tr. 6). The following facts were developed at the hearing: [4]

The Company is a member of Peninsula Automobile Dealers Association ("PADA") and the California Association of Employers ("CAE"). Since 1953, PADA (through CAE conducting negotiations on PADA's behalf) has bargained and contracted with Lodge No. 1414 of the International Association of Machinists [5] as the representative of a multiemployer unit consisting of the mechanics and repairmen employed by the Company and other members of PADA.

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[3] Professional Automobile Salesmen, Drivers and Demonstrators, Local No. 960, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America.

[4] The Union had also filed election petitions to represent, in separate single-employer units, two additional members of the association, namely, E-Z Davies Chevrolet and Fairway Chevrolet. The three petitions were consolidated for hearing and decision (R. 5). All three employers, represented by the same counsel, moved to dismiss the respective petitions on the unit ground set forth above.

[5] Peninsula Auto Mechanics Lodge No. 1414, International Association of Machinists.

Since 1953 PADA has similarly bargained with Local No. 665 and Local No. 576 of the Teamsters Union,[6] as bargaining representatives of the remaining shop employees of PADA's members (R. 14; Tr. 6-21, 41, 45-47, E.X. 1-6).

In 1953, also, Local 775 of the Retail Clerks Union [7] was designated as the bargaining representative of the salesmen employed by the Company and other members of PADA. This bargaining relationship, however, expired when no collective bargaining contract could be agreed upon. In 1958, Local 576, Teamsters, who, as shown above, represents part of the shop employees, was designated as the bargaining representative of the salesmen employed by PADA's members. Again, however, PADA and the salesmen's representative could reach no collective bargaining agreement. Thus when the Union filed the instant election petition to represent the Company's salesmen in a single-employer unit, neither they nor other salesmen employed by PADA's other members had ever been covered by a multiemployer contract between PADA and any labor organization (R. 14; Tr. 22-23).

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[6] Garage & Service Station Employees' Union, Local No. 665, International Brother of Teamsters, Chauffeurs, Warehousemen and Helpers of America; and, Automotive Workers Union, Local No. 576. International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America.

[7] Local 775, Retail Clerks International Association, AFL-CIO.

On the basis of these facts,[8] the Regional Director determined that the Company's salesmen constitute an appropriate bargaining unit; he rejected the Company's contention that the Company's salesmen could be appropriately represented only in a multiemployer unit comprised of the salesmen of all PADA members. Accordingly, the Regional Director denied the Company's motion to dismiss the petition, and directed an election in a unit comprised of the Company's salesmen (R. 13-16). The Company filed a Request for Review with the Board, which denied the request on September 3, 1965, thereby affirming the Regional Director (R. 17-26).

The salesmen elected the Union (R. 30). The Company filed objections seeking to set aside the election. The Company asserted that the Union's use of an election observer, who was a Union official and also an employee of another employer, prevented a free election (R. 31-32). The Regional Director conducted an administrative investigation of the Company's objection, which showed the following:

The Union selected Wallace L. Banner, Jr. as its election observer. Banner is an elected vice-president of the Union, and receives $50.00 per month for expenses but no salary. Banner is a full-time automobile salesman employed by an automobile dealer in San Francisco whose salesmen are represented by the Union. The Board agent conducting the election

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[8] Other evidence introduced at the pre-election hearing bore on questions of individual employee unit inclusion, which are no longer in issue.

permitted Banner to serve as the Union's observer over the Company's opposition. No claim was made that Banner engaged in any improper conduct during the polling; he wore no insignia other than his official observer's badge; he did not speak to the voters during the election (R. 33-34).

On the basis of the above facts, the Regional Director concluded that Banner's performance as the Union's observer did not prevent a free election, and overruled the Company's objection. Accordingly, the Regional Director certified the Union as the representative of the Company's salesmen (R. 34-36). The Company filed a Request for Review with the Board (R. 37-41), which was denied on January 24, 1966 (R. 42). A request for reconsideration was also denied (R. 43-45).

B. *The unfair labor practice proceeding*

When the Union sought recognition and bargaining, the Company refused, and did not reply to the last of the Union's several requests (R. 65-69). The Union then filed charges, and a complaint issued alleging refusal to bargain in violation of Section 8(a)(5) and (1) of the Act. The Company answered, in the form of a general denial of the commission of unfair labor practices (R. 46-57). As no issues had been raised requiring a hearing before a trial examiner, the General Counsel moved the Board to grant summary judgment against the Company. Orders were granted transferring the proceeding to the Board and directing the Company to show cause, in

writing, why the motion for summary judgment should not be granted (R. 72-78). The Company filed a response in which it asserted that the Board had no authority to grant a motion for summary judgment, and could not rule on the complaint until after a hearing and the opportunity to call witnesses and introduce evidence (R. 79-85).

II. The Board's Conclusions and Order

The Board granted the motion for summary judgment, holding that the Company violated Section 8 (a) (5) and (1) of the Act by refusing to recognize and to bargain with the Union after it had been duly elected and certified as the bargaining agent in an appropriate unit comprised of the Company's salesmen. The Board rejected the Company's assertion that it was improperly being denied an evidentiary hearing. No new evidence was offered to warrant relitigating issues resolved in the representation proceeding. Accordingly, a hearing on the complaint was not required and, the Company having admittedly refused to recognize the certified representative of a unit of its employees, summary judgment was proper (R. 86-92).

The Board's order directs the Company to cease and desist from the unlawful conduct found, to bargain with the Union upon request, and to post the usual notice (R. 92-95).

ARGUMENT

The Board Properly Found That Respondent Violated Section 8(a)(5) and (1) of the Act by Refusing to Recognize and to Bargain With a Union Which Had Been Duly Elected and Certified as the Bargaining Representative of an Appropriate Unit of Respondent's Employees

The Company's conceded refusal to recognize and to bargain with the Union, after it was elected by the Company's salesmen and certified by the Board, violated Section 8(a)(5) and (1) of the Act unless, as the Company asserts, the election and certification were invalid. We show below that this assertion has no merit. We further show that the Board did not commit any procedural error in granting the General Counsel's motion for summary judgment.[9]

A. *The Board properly found that the Company's new and used car-truck salesmen constitute an appropriate bargaining unit*

Section 9(b) of the Act provides that "the Board shall decide in each case whether, in order to secure to employees the fullest freedom in exercising the rights guaranteed by this Act, the unit appropriate for collective bargaining shall be the employer unit,

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[9] As set forth, *supra,* p. 3 n. 4, in a consolidated representation proceeding three elections were held; in two, the employees of the Company and E-Z Davies Chevrolet elected the Union. E-Z Davies asserts error in the representation proceeding and in a subsequent unfair labor practice proceeding on the identical grounds raised by the Company. *N.L.R.B.* v. *E-Z Davies Chevrolet,* No. 21,918. After filing of briefs, the Board will move for consolidation of the cases for argument.

craft unit, plant unit, or subdivision thereof" (*infra* pp. 28-29). Before the Board, the Company made no contention that its automotive salesmen do not constitute a distinct, homogenous group which traditionally has been held an appropriate bargaining unit. See, *Lownsbury Chevrolet Company*, 101 NLRB 1752; *Weaver-Beatty Motor Co.*, 112 NLRB 60; *N.L.R.B.* v. *McCarthy Motor Sales Co.*, 309 F. 2d 732, 733 (C.A. 7). In finding such a unit permissible here, the Board applied its oft-repeated and judicially approved rule that absent a controlling history of bargaining on a broader basis, a single-employer unit is presumptively appropriate. *N.L.R.B.* v. *American Steel Buck Corp.*, 227 F. 2d 927, 929-930 (C.A. 2), enforcing 110 NLRB 2156, 2160; *Bull Insular Line, Inc. et al.*, 107 NLRB 674, 682; *Pearl Brewing Co.*, 106 NLRB 192, 193; and see *Joseph E. Seagram & Sons*, 101 NLRB 101, 103. The Board properly rejected the Company's claim that, nonetheless, its salesmen could only be represented as part of a multiemployer unit.

Unit determinations are particularly within the responsibility and wide discretion of the Board. The agency's unit direction is "rarely to be disturbed" (*Packard Motor Co.* v. *N.L.R.B.*, 330 U.S. 485, 491), and "will not be set aside in the absence of a showing that such determination was arbitrary and capricious." (*N.L.R.B.* v. *Merner Lumber Co.*, 345 F. 2d 770, 771 (C.A. 9), cert. denied, 382 U.S. 942). Accord: *N.L.R.B.* v. *Moss Amber Mfg. Co.*, 264 F. 2d 107, 110-111 (C.A. 9); *N.L.R.B.* v. *Krieger-Ragsdale & Co.*, 379 F. 2d 517, 519-520 (C.A. 7). Arbitrariness

and capriciousness in the instant case, asserted the Company, are shown by the following factors (see R. 17-26): The Company is a member of an association of automobile dealers (PADA) in the greater San Francisco area, which is authorized to bargain collectively for its members. During the last 15 years the Board has certified unions to represent the members' shop employees in multiemployer units. PADA has bargained with these unions on a multiemployer basis and entered into associationwide collective bargaining agreements on behalf of the Company and other members. When the Union filed its election petition to represent the Company's salesmen in a single-employer unit, there were current multiemployer agreements covering the shop employees. And during this 15 year period the Board successively certified two unions as the representative of the members' salesmen in a multiemployer unit, albeit on each occasion the bargaining relationship did not subsist for failure of PADA and the union to agree to a contract covering the salesmen (see *supra* pp. 3-4).[10]

The above factors, however, scarcely demand a conclusion that the Company's salesmen may now ex-

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[10] The Company's salesmen have apparently been allowed to participate in a health and welfare program set up in a trust agreement negotiated between PADA and unions representing shop employees in multiemployer units (R. 21-22; Tr. 30, E.X. 5). The Company put misplaced reliance on this factor. The voluntary extension of employment benefits to employees outside a multiemployer unit bears little on unit considerations and may not control the Board's unit determination. See, *N.L.R.B.* v. *Friedland Painting Co.* 377 F. 2d 983, 987 (C.A. 3).

ercise the right to bargain collectively only if grouped in a multiemployer unit. The Company's insistence on the inappropriateness of single-employer bargaining was premised on the past and current history of multiemployer bargaining concerning other employee groups. This history, however, does not automatically crystallize the bargaining pattern for *all* of the employees of the Company and other PADA members. The collective bargaining history of the particular employees sought to be represented is the central relevant factor. It is well within the Board's discretion to permit single-employer bargaining for the unrepresented employees of employers who otherwise participate in multiemployer bargaining. *N.L.R.B.* v. *American Steel Buck Corp.*, *supra.* Compare, *N.L.R.B.* v. *Local 210, Teamsters*, 330 F. 2d 46 (C.A. 2). A different result was not dictated here by the two occasions during which the salesmen in PADA were unsuccessfully represented on a multiemployer basis. The Board, in furtherance of employee rights, looks for a *successful* bargaining history. Here, as in *Lownsbury Chevrolet Company*, *supra*, a "sporadic history of multiemployer bargaining for the salesmen [does not] render the [single-employer] unit sought inappropriate" (101 NLRB at 1754). Moreover, the Company's salesmen were unrepresented when the Union filed its petition. The unions who once represented the salesmen did not choose to be involved in the election proceeding. Cf. *N.L.R.B.* v. *David Friedland Painting Co.*, *supra*, 377 F. 2d at 987. Hence, the Company's assertion of a *controlling* bargaining

history which should not be disrupted is without merit. "It is well settled that a single-employer unit is presumptively appropriate, and that to establish a claim for a broader unit a controlling history of collective bargaining on a broader basis by the employers *and the union involved* must exist." (emphasis supplied.) *Chicago Metropolitan Home Builders Association*, 119 NLRB 1184, 1195; *John Breuner Co.*, 129 NLRB 394, 396.

The cases cited by the Company support no other result. In 1953, as shown, the Board held that the salesmen employed by PADA's members could, like their other employees, be grouped in a multiemployer unit. But the Board adhered to the principles set forth above and applied here. Thus in 1953 the Board directed the multiemployer unit since the petitioning union had obtained the requisite showing of organizational interest among salesmen throughout PADA. At that time the union was willing to represent the salesmen on the broader basis. The Board distinguished cases where "the only union seeking to represent the employees involved sought to represent them on a single-employer basis." *Peninsula Auto Dealers Association, et al.*, 107 NLRB 56, 58. See *N.L.R.B.* v. *Local 210, Teamsters, supra*, 330 F. 2d at 47-48. Multiemployer bargaining requires the consent of both union and employer, and in situations where the only union involved does not agree to represent employees on that basis it will not be required to do so. See, *Chicago Metropolitan Home Builders Association, supra; Cab Operating Corp., et al.*, 153

NLRB 878, 879-880. Accord: *Harbor Plywood Corp., et al.*, 119 NLRB 1429, 1432; *Detroit Newspaper Publisher Association* v. *N.L.R.B.*, 372 F. 2d 569 (C.A. 6). This is the situation now, in contrast to 1953 when the petitioning union was qualified and agreed to represent PADA's salesmen in a multi-employer unit. The Board, accordingly, found that the single-employer unit sought was appropriate.

The Board, of course, must re-assess prior unit determinations upon a timely election petition.[11] Had the Board, as urged by the Company, refused to recognize the propriety of a single-employer unit of these employees, and insisted that in order to become eligible for representation they must first re-organize in a unit embracing the salesmen of every other employer-member of PADA, the practical effect would have been to deny the Company's salesmen "the fullest freedom in exercising the rights guaranteed by this Act" (Section 9(b), *supra*). For, "not many employee groups can simultaneously mount an organizing campaign among employees at [numerous] plants." *Joseph E. Seagram & Sons, Inc., supra*, 101 NLRB at 103.

The Company put equally misplaced reliance on *The Los Angeles Statler Hilton Hotel*, 129 NLRB 1349, where the Board denied the union's request for single-employer units comprised of employees currently excluded from an existing multiemployer unit

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[11] See, e.g., *Thalhimer Brothers, Inc.*, 93 NLRB 726, 727; *United Mine Workers, District 50* v. *N.L.R.B.*, 234 F. 2d 565, 568 (C.A. 4).

represented by another union. The Board determined that the unrepresented employees of each employer lacked "any internal homogeneity [or] cohesiveness" and, therefore, did not comprise appropriate separate bargaining units. The Board expressly distinguished cases like the instant one, where existing multiemployer bargaining for other groups of employees does not bar "single-employer units . . . composed of categories of employees such as guards, office clerical employees, and [*automotive*] *salesmen*, categories which have an internal homogeneity and cohesiveness and could therefore stand alone as an appropriate unit." (emphasis added.) 129 NLRB at 1351. Cf. *Crumley Hotel, Inc., d/b/a Holiday Hotel, et al.*, 134 NLRB 113, 115-116.

The Company asserted (R. 20-22) that, particularly in view of the prior finding that a multiemployer unit was appropriate, the Union was seeking a narrower unit based on its organizing success and, therefore, the Board's unit finding was "controlled" by extent of organization within the proscription of Section 9(c)(5) of the Act. (see *infra* p. 29). It may be assumed, however, that the scope of organization was a predicate for the Union's unit selection. This would not establish that the Board's unit finding was controlled by the organizational factor. As stated by this Court in rejecting this contention: "Section 9(c)(5) . . . precludes the Board only from giving controlling weight to extent of organzation. . ." *N.L.R.B.* v. *Moss Amber Mfg. Co.*, 264 F. 2d 107, 110 n. 1 (C.A. 9); see also *Metropolitan Life Ins. Co.* v.

N.L.R.B., 328 F. 2d 820, 822 (C.A. 3), vacated on other grounds, 380 U.S. 523; *The Board and Section 9(c)(5): Multilocation and Single-location Bargaining Units in the Insurance and Retail Industries*, 79 Harvard Law Review 811, 824-825 (1966). Assuming, furthermore, that the multiemployer unit urged by the Company might still be appropriate, this would not put into question the propriety of the single-employer unit which the Union sought. There is no concept of a "more" or "most" appropriate unit. "It is not unusual for there to be more than one 'appropriate' unit. The Board may choose from among several appropriate units" (*N.L.R.B.* v. *Local 19, IBL*, 286 F. 2d 661, 664 (C.A. 7), cert. denied, 368 U.S. 820), and the grant of the narrower unit requested of itself raises no issue of improper reliance on extent of organization. *N.L.R.B.* v. *Smith*, 209 F. 2d 905, 907 (C.A. 9); *General Instrument Corp.* v. *N.L.R.B.*, 319 F. 2d 420, 423 (C.A. 4), cert. denied, 375 U.S. 966. Accord: *Foreman & Clark, Inc.* v. *N.L.R.B.*, 215 F. 2d 396, 406 (C.A. 9), cert. denied, 348 U.S. 887. If, as here, the unit is otherwise appropriate, it is not rendered inappropriate merely because it coincides with the extent to which a union has organized. In short, here, as in the past, the Board applied the settled principle "that the Act does not compel a labor organization to seek representation in the most comprehensive grouping unless such grouping constitutes the *only* appropriate unit." *The Wm. H. Block Company*, 151 NLRB 318, 320.

Moreover, the Board may consider the fact that no labor organization is currently seeking a broader unit as an additional, and determinative, ground for permitting the narrower unit sought when, as in this case, that unit meets the relevant criteria for appropriateness. Section 9(c)(5) does not preclude consideration of the union's organizational interest where more than one unit is appropriate. The section was only intended to prohibit unit determinations which "could only be supported on the basis of extent of organization . . . [and] was not intended to prohibit the Board from considering the extent of organization as one factor, though not the controlling factor, in its unit determination." *N.L.R.B.* v. *Metropolitan Life Insurance Co.*, 380 U.S. 438, 441-442; *N.L.R.B.* v. *Moss Amber Mfg. Co.*, *supra*, 264 F. 2d at 111; *N.L.R.B.* v. *Sun Drug Co.*, 359 F. 2d 408, 412 (C.A. 3); *Texas Pipe Line Co.* v. *N.L.R.B.*, 296 F. 2d 208, 213-214 (C.A. 5).

In the election proceeding the Company also asserted (R. 22-24) that here, as in *N.L.R.B.* v. *Metropolitan Life Insurance Co.*, *supra*, an issue of unauthorized reliance on extent of organization is raised by an alleged failure of the Board to explicate adequately the basis of its unit determination. *Metropolitan* involved the Board's application of a new policy, adopted after 15 years of contrary practice, which permits bargaining units of insurance agents less than statewide or companywide in scope. The Supreme Court concluded that the Board had inconsistently applied the new policy in several cases without sufficiently giving reasons for the disparate application.

The Court remanded on the ground that in these circumstances lack of explication precluded a determination of whether permissible weight had been placed on extent of organization. Here, however, the Board noted, *inter alia*, the undisputed fact that the Company's salesmen comprise an appropriate bargaining group and, citing previous decisions, the Board's long-settled practice of not denying employees the usual right to single-employer bargaining merely because other groups of the employer's employees are represented on a broader basis (R. 14-15). In sum, the Board, as we have shown, followed unit standards consistently applied in its previous decisons. It was not incumbent upon the Board to explicate further the statutory basis for standards so well recognized. As the Supreme Court held in *Metropolitan*, "Of course, the Board may articulate the basis of its order by reference to other decisions or its general policies . . . so long as the basis of the Board's action, in whatever manner the Board chooses to formulate it, meets the criteria for judicial review." 380 U.S. at 443 n. 6. See, *N.L.R.B.* v. *Sun Drug Co.*, *supra*, 359 F. 2d at 412; *S. D. Warren Co.* v. *N.L.R.B.*, 353 F. 2d 494, 498-499 (C.A. 1), cert. denied 383 U.S. 958. Accord: *American President Lines Ltd.* v. *N.L.R.B.*, 340 F. 2d 490, 492 (C.A. 9).

B. *The Board properly held that an employee of another employer who was a union official could act as the Union's election observer*

As shown *supra* pp. 5-6, the Union was permitted to select a union official, who was an employee of

another employer, as its election observer. The Company's election objection asserting that this prevented a free election was properly rejected.[12] It is well settled that an election need not be set aside on a showing that the union's observer was an employee of another employer, and a paid union official or organizer. *N.L.R.B.* v. *Huntsville Mfg. Co.*, 203 F. 2d 430, 433, 434 (C.A. 5); *Shoreline Enterprises* v. *N.L.R.B.*, 262 F. 2d 933, 938, 942 (C.A. 5); *N.L.R.B.* v. *Zelrich*, 344 F. 2d 1011, 1015 (C.A. 5). Of course, special circumstances, e.g., improper electioneering by such observers, may prevent a free election. But as the Board noted, the Company made no claim of this nature (R. 31-42). Rather, the Company simply equated the selection of a union official with instances where the Board has not permitted supervisors of the employer to act as election observers. To be sure, the Board's general policy is to prohibit both the union and the employer from using the employer's supervisory personnel as observers. The equation which the Company makes, however, was rejected in the above-cited cases. The courts have thus agreed that generally union spokesmen may be distinguished from managerial officials, for the latter's immediate power to alter working condition raises a risk of subtle pressures during the voting process. The cases cited

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[12] The Company asserted that the Board's summary affirmance of the Regional Director's decision overruling the election objection lacked the necessary explication. (R. 43-47). This contention has no merit. *N.L.R.B.* v. *Schill Steel Products*, 340 F. 2d 568, 574 (C.A. 5); *N.L.R.B.* v. *Air Control Products*, 335 F. 2d 245, 251 n. 26 (C.A. 5).

by the Company illustrate this distinction. See, *R. R. Donnelly & Sons Company*, 15 LRRM 192 (personnel manager who interviewed applicants for employment and resolved employee grievances); *Harry Manaster & Brothers*, 61 NLRB 1373 (same); *The Union Switch & Signal Company*, 76 NLRB 205, 211 (attorney for employer); *Parkway Lincoln-Mercury Sales, Inc.*, 84 NLRB 475 (no exceptions filed to Regional Director's finding that employer's vice president should not have acted as observer); *Herbert Men's Shop Corp.*, 100 NLRB 670, 671, 674-676 (managerial executive who represented employer in negotiations and resolved employee grievances); *International Stamping Co., Inc.*, 97 NLRB 921, 922-923 (president's son and sister-in-law, who improperly left voting area and checked off names of employees as they went to vote); *Peabody Engineering Co.*, 95 NLRB 952 (employer's attorney).[13]

The Supreme Court early made it clear that in representation proceedings, "the control of the election proceeding and the determination of the steps necessary to conduct the election were matters that Congress entrusted to the Board alone." *N.L.R.B.* v. *Waterman S. S. Corp.*, 309 U.S. 206, 226. The Com-

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[13] The Board's practice, however, of not permitting persons closely identified with management to act as observers is not applied with the rigidity the Company suggests. The practice, for example, does not require invalidating an election where, even though the observer was a supervisor, his position in the employer's hierarchy and all the circumstances did not suggest management influence at the polls. *Plant City Welding & Tank Co.*, 119 NLRB 131, 132.

pany fell far short of meeting the burden of showing that the Board in the instant case abused its wide degree of discretion. *N.L.R.B.* v. *Mattison Machine Works*, 365 U.S. 123, 124; *Foreman & Clark, Inc.* v. *N.L.R.B.*, *supra*, 215 F. 2d at 409; *International Telephone & Telegraph Corp.* v. *N.L.R.B.*, 294 F. 2d 393, 395 (C.A. 9).

C. *The Board properly rejected the contention that summary judgment against the Company was improper*

As set forth *supra* pp. 3, 5-6, as required by the Act, the parties were accorded a pre-election hearing on such matters in dispute as the appropriate unit, and the Company was provided review by the Board of the Regional Director's unit determination. The Company's post-election objection was overruled by the Regional Director after the usual administrative investigation; the Regional Director was affirmed on review by the Board. The Company made no charge, as it could not, that this latter procedure was improper. The election objection raised solely the propriety of a union official, an employee of another employer, acting as an observer. No contention was even made that this issue involved any factual dispute (R. 28-29, 34-35). Under long-approved principles, post-election issues are decided after administrative investigation, unless the objecting party can affirmatively show that substantial and material issues of fact have been raised which can only be resolved at a hearing. "[T]he Act [does] not require such a hearing" (*N.L.R.B.* v. *J.R. Simplot*, 322 F. 2d 170, 172

(C.A. 9)), which is often requested solely as a "'dilatory tactic . . . by employers or unions disappointed in the election returns. . .'" (*N.L.R.B.* v. *Sun Drug Co.*, *supra*, 359 F. 2d at 414).

In order to obtain review of the representation determinations, the Company refused to recognize the election and certification. Upon the initiation of the complaint proceeding to test the certification, however, the representation and unfair labor practice proceedings "are really one" (*Pittsburgh Plate Glass Co.* v. *N.L.R.B.*, 313 U.S. 146, 158), and the Board need not permit relitigation of issues determined at the election stage absent a showing of newly discovered or previously unavailable material evidence. *Pittsburgh Plate Glass*, *supra*, 313 U.S. at 161-162. The Company made no such showing: its answer constituted a general denial of unlawful conduct (R. 56-57); its response to the order to show cause why summary judgment should not be granted merely contained an allegation that the Company "intends, as part of its defense, to offer at the hearing additional evidence which would bear upon its defense" (R. 79, 82). No offer was made of any specific evidence. The Company did "not suggest what new facts a hearing would develop or what if any evidence would be produced." *N.L.R.B.* v. *J. R. Simplot*, *supra*, 322 F. 2d at 172, quoted with approval; *N.L.R.B.* v. *National Survey Service, Inc.*, 361 F. 2d 199, 205 (C.A. 7); *Macomb Pottery Co.* v. *N.L.R.B.*, 376 F. 2d 450, 453 n. 4 (C.A. 7); *N.L.R.B.* v. *Tennessee Packers, Inc.*, 379 F. 2d 172, 178 (C.A. 6). This Court has recog-

nized that, " 'If . . . an issue is to be relitigated in a subsequent unfair labor practice proceeding once it has been canvassed in a certification proceeding it is up to the party desiring to do so to indicate in some affirmative way that the evidence offered is more than cumulative.' " *N.L.R.B.* v. *Hadley, Inc.*, 322 F. 2d 281, 286 (C.A. 9). Accord: *N.L.R.B.* v. *Moss Amber Mfg. Co.*, *supra*, 264 F. 2d at 107; *N.L.R.B.* v. *Tennessee Packers, Inc.*, *supra*, 379 F. 2d at 179-180; *N.L.R.B.* v. *Douglas County, Electric Membership Corp.*, 358 F. 2d 125, 129-130 (C.A. 5).

The Company, moreover, made little attempt to show that, despite its admitted refusal to recognize the Union, the Board could not find a violation of Section 8(a)(5) and (1) of the Act and enter a bargaining order upon which this Court could properly review the representation determinations. The gravamen of the Company's argument is that the Board has no authority to enter the order by way of a summary judgment. However, as in the federal district courts, the Board's summary judgment procedure "separate[s] what is formal or pretended in denial or averment from what is genuine and substantial so that only the latter may subject a suitor to the burden of trial." 6 Moore, *Federal Practice*, para 56.15 (a) p. 2332 (2d. Ed.), quoting *Richard* v. *Credit Suisse*, 242 N.Y. 346, 152 NE 110 (Cardozo, J.) An opposing party, who has no countervailing evidence and who cannot show that any will be available at the trial, [is not] entitled to a . . . [trial] on the basis of a hope that such evidence will develop at the trial."

6 Moore, *Federal Practice*, para. 56.15(3), p. 2343-2344. As stated by the Third Circuit (*N.L.R.B.* v. *Sun Drug Co.*, *supra*, 359 F. 2d at 415-416):

> Nor is an evidentiary hearing required to permit a party to ascertain whether there is a substantial and material question of fact or to focus attention on its view of the factual situation which has already been developed.

For, "due process does not require an evidentiary hearing as a prerequisite to a valid determination of a question of law." *N.L.R.B.* v. *Sun Drug Co., Inc.*, *supra*, 359 F. 2d at 415. As the Company's answer and its response to the motion for summary judgment established no evidentiary issue, the direction of a hearing "would serve only to permit argument which could as well [be] presented in the [response] itself." *N.L.R.B.* v. *National Survey Service*, *supra*, 361 F. 2d at 205.[14] Furthermore, using summary procedure serves an important statutory purpose by expeditiously resolving the choice of bargaining representatives: "Time is a critical element in election cases." *N.L.R.B.* v. *Sun Drug Co.*, *supra*, 359 F. 2d at 414.

The courts have thus uniformly approved the use of summary judgment in the circumstances presented here. *Acme Industrial Products, Inc.* v. *N.L.R.B.*, 373 F. 2d 530 (C.A. 3), enforcing *per curiam*, 158 NLRB

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[14] In *Russell-Newman Mfg. Co.*, 158 NLRB 1260, cited by the Company (R. 82), the General Counsel's motion was denied only after the employer offered to adduce specific new evidence contrary to the facts found by the Regional Director in the representation proceeding. As shown, the Company made no such offer.

180; *Neuhoff Bros. Packers, Inc.* v. *N.L.R.B.*, 362 F. 2d 611, 613 (C.A. 5), cert. denied, 386 U.S. 956; *N.L.R.B.* v. *Tennessee Packers, Inc.*, *supra*, 379 F. 2d at 176-177, 179-180; *N.L.R.B.* v. *National Survey Service, Inc.*, *supra*, 361 F. 2d at 202, 208; *Macomb Pottery* v. *N.L.R.B.*, *supra*, 376 F. 2d at 452; *N.L.R.B.* v. *Jordan Bus Co.*, 380 F. 2d 219 (C.A. 10), enforcing 153 NLRB 1551. See 1 Davis, *Administrative Law*, Section 7.01 at 411 (West, 1958).[15] The courts have rejected the contention (see R. 80-81) that summary procedure is precluded by Section 10(b) of the Act, which provides that an unfair labor practice complaint shall be considered upon a hearing. As stated by the Seventh Circuit, "[Section]10(b) cannot logically mean that an evidentiary hearing must be held in a case where there is no issue of fact." *Macomb Pottery Co.* v. *N.L.R.B.*, *supra*, 376 F. 2d at 477.[16]

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[15] In *N.L.R.B.* v. *KVP Sutherland Paper Co.*, 356 F. 2d 671 (C.A. 6) the court held that in the circumstances relitigation of a unit determination should have been permitted and that summary judgment was improperly granted. In the court's view the employer had made a timely showing of a substantial and bona fide change in operations since the representation case which, as the Board has recognized, may warrant reconsidering a unit determination in the complaint proceeding. The Company made no such contention.

[16] The court in *Macomb* also rejected the argument (R. 81) that the Act contains no express authority for a summary judgment procedure and that, in any event, the procedure must be formulated by the Board's issuance of a formal rule. The Board's rules provide generally for pre-hearing motions (see, 29 C.F.R. Sec. 102.24) and that procedure was followed here. Cf. *N.L.R.B.* v. *Monsanto Chemical Co.*, 205 F. 2d 763,

CONCLUSION

For the reasons stated, it is respectfully submitted that a decree should be entered enforcing the Board's order in full.

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Associate General Counsel,

MARCEL MALLET-PREVOST,
Assistant General Counsel,

GLEN M. BENDIXSEN,
Attorney,
National Labor Relations Board.

October 1967.

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764 (C.A. 8); *N.L.R.B.* v. *Peter Weber and Local 825, International Union of Operating Engineers, AFL-CIO,* —— F. 2d —— (C.A. 3), No. 16396, August 28, 1967 (66 LRRM 2049). Moreover, the motion for summary judgment plainly may, as here, be addressed to the Board directly. The Board is the decision making authority. See, *Warehousemen and Mail Order Employees, Local 743* v. *N.L.R.B.*, 302 F. 2d 865, 866, 869 (C.A. D.C.); 2 Davis, *Administrative Law,* Section 10.02 at 6-11 (West, 1958). While the Board usually delegates to a trial examiner the authority to conduct the proceeding and issue a recommended decision, the Board may consider the complaint directly (Section 10(b) and (c) of the Act, *infra* p. 29; see also 29 C.F.R. 102.50). The Company's claim to a right to a "Trial Examiner's decision" (R. 81) is, in short, wholly without foundation, *N.L.R.B.* v. *Stocker Mfg. Co.*, 185 F. 2d 451 (C.A. 3). Compare, *Utica Mutual Life Insurance Co.* v. *Vincent,* 375 F. 2d 129, 132 (C.A. 2), cert. denied, —— U.S. ——.

Certificate

The undersigned certifies that he has examined the provisions of Rules 18 and 19 of this Court and in his opinion the tendered brief conforms to all requirements.

Marcel Mallet-Prevost
Assistant General Counsel
National Labor Relations Board

APPENDIX A

Pursuant to Rule 18(2)(f) of the Rules of this Court:

(Page references are to the stenographic transcript in Board Case No. 20-RC-6458, 20-RC-6462, and 20-RC-6463)

Board Case No. 20-CA-4016

Exhibits	For Identification	In Evidence
Board's:		
Nos. 1(a) through 1(h)	5	6
Employer's:		
No. 1	12	13
No. 2	13	14
No. 3	14	17
No. 4	17	18
No. 5	18	21
No. 6	21	22

APPENDIX B

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C., Secs. 151, *et seq.*) are as follows:

Rights of Employees

Sec. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8(a)(3).

Unfair Labor Practices

Sec. 8(a) It shall be an unfair labor practice for an employer—

> (1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7;
>
> * * * *
>
> (5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 9(a).

* * * *

Representatives and Elections

* * * *

[Sec. 9] (b) The Board shall decide in each case whether, in order to assure to employees the fullest

freedom in exercising the rights guaranteed by this Act, the unit appropriate for the purposes of collective bargaining shall be the employer unit, craft unit, plant unit, or subdivision thereof: * * *

* * * *

(5) In determining whether a unit is appropriate for the purposes specified in subsection (b) the extent to which the employees have organized shall not be controlling.

* * * *

Prevention of Unfair Labor Practices

* * * *

[Sec. 10] (b) Whenever it is charged that any person has engaged in or is engaging in any such unfair labor practice, the Board, or any agent or agency designated by the Board for such purposes, shall have power to issue and cause to be served upon such person a complaint stating the charges in that respect, and containing a notice of hearing before the Board or a member thereof, or before a designated agent or agency, at a place therein fixed, not less than five days after the serving of said complaint: . . . . The person so complained of shall have the right to file an answer to the original or amended complaint and to appear in person or otherwise and give testimony at the place and time fixed in the complaint . . . . Any such proceeding shall, so far as practicable, be conducted in accordance with the rules of evidence applicable in the district courts of the United States under the rules of civil procedure for the district courts of the United States, adopted by the Supreme Court of the United States pursuant to the Act of June 19, 1934 (U.S.C., title 28, secs. 723-B, 723-C).

(c) The testimony taken by such member, agent, or agency or the Board shall be reduced to writing and filed with the Board. Thereafter, in its discretion, the Board upon notice may take further testimony or hear argument. If upon the preponderance of the testimony taken the Board shall be of the opinion that any person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action including reinstatement of employees with or without back pay, as will effectuate the policies of this Act: . . . .

* * * *

[Sec. 10] (e) The Board shall have power to petition any court of appeals of the United States, . . . within any circuit . . . wherein the unfair labor practice in question occurred or wherein such person resides or transacts business, for the enforcement of such order and for appropriate temporary relief or restraining order, and shall file in the court the record in the proceedings, as provided in section 2112 of title 28, United States Code. Upon the filing of such petition, the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction of the proceeding and of the question determined therein, and shall have power to grant such temporary relief or restraining order as it deems just and proper, and to make and enter a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board. No objection that has not been urged before the Board, its member, agent, or agency, shall be considered by

the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances. The findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive. If either party shall apply to the court for leave to adduce additional evidence and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for the failure to adduce such evidence in the hearing before the Board, its member, agent, or agency, the court may order such additional evidence to be taken before the Board, its member, agent, or agency, and to be made a part of the record . . . . Upon the filing of the record with it, the jurisdiction of the court shall be exclusive and its judgment and decree shall be final, except that the same shall be subject to review by the . . . Supreme Court of the United States upon writ of certiorari or certification as provided in section 1254 of title 28.

* * * *

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21887

No. ~~21918~~

In the

United States Court of Appeals

For the Ninth Circuit

NATIONAL LABOR RELATIONS BOARD,
Petitioner,

vs.

CARL SIMPSON BUICK, INC.,
Respondent.

Brief for Respondent

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STATEMENT OF THE CASE

Respondent adopts the basic statement of the case set forth in the Board's brief, pp. 2-7, subject to the additions contained in the body of this brief, and with the following exceptions. The Regional Director's administrative investigation (Board brief, p. 5-6), was conducted on an *ex parte* basis, without opportunity for the company to appear, offer evidence, cross-examine witnesses, or inspect other evidence relied on by the Regional Director. And the Board's statement that "no issues had been raised requiring a hearing before a trial examiner" (Board brief, p. 6) pre-judges one of the major questions at issue here, i.e.,

whether a material and substantial issue of fact was presented requiring a hearing on the merits. NLRB Rules & Regs. § 102.69, 29 C.F.R. § 102.69.

SUMMARY OF ARGUMENT

In selecting a unit of salesmen employed only at Respondent's place of business as "the appropriate unit" for purpose of collective bargaining, the Board relies upon the fact that no contract had ever resulted from collective bargaining on a multi-employer basis; that no union was then seeking to represent these salesmen in a multi-employer unit; and that "not many employee groups can simultaneously mount an organizing campaign among employees at [numerous] plants" (Board brief, p. 13). Although charged with the duty to select the appropriate unit "in each case" by § 9 (b) of the National Labor Relations Act (hereinafter "Act"), 29 U.S.C. § 159 (b), the Board also relies upon its rule that "absent a controlling history of bargaining on a broader basis, a single-employer unit is presumptively appropriate" (Board brief, p. 9).

The Board gave little or no weight to the following factors supporting a multi-employer unit. Respondent is and was a member of Peninsula Auto Dealers Association (hereinafter "PADA"), a 50-member association comprising automobile dealerships in the southern San Francisco Peninsula area, which had bargained collectively with union representatives of all employees, including salesmen, since 1953. On two previous occasions the Board—and on one occasion a sister local of the union here involved—determined that the multi-employer unit for the salesmen was appropriate. All PADA salesmen were covered by a health and welfare plan under the same organization administering a similar plan agreed upon between PADA

and union representatives of the remaining employees. The Board also refused to recognize that "unit findings ought not to ignore the desirability of accommodating the opportunity of employees to organize with management's ability to run its business," and that " 'there should be some minimum consideration given to the employer's side of the picture, the feasibility, and the disruptive effects of piecemeal unionization.' " *NLRB v. Purity Food Stores, Inc.*, 376 F.2d 497, 500 (1st Cir.), cert. denied, ... U.S. ....., 88 S.Ct. 337 (Nov. 13, 1967).

In view of the circumstances here presented, the Board's reliance upon relative union strength and position in making the unit determination conclusively demonstrates that it acted "arbitrarily and capriciously" in selecting the single-employer unit, *NLRB v. Merner Lumber and Hardware Co.*, 345 F.2d 770, 771 (9th Cir.), cert. denied, 382 U.S. 942 (1965), and that its decision was "controlled" by the extent of union organization in contravention of § 9 (c) (5) of the Act. 29 U.S.C. § 159 (c) (5). The Board's use of its "presumption" that single employer units are appropriate "adds nothing." *NLRB v. Purity Food Stores, Inc., supra,* 376 F.2d at 501.

Although the Board should not now be allowed to cause further delays and expense to Respondent, this matter must, at the very least, be remanded to the Board for further proceedings in view of the lack of articulated bases for its unit decision. *NLRB v. Metropolitan Life Insurance Co.*, 380 U.S. 438, 442-444 (1965).

The Board certification of the Union was improper, since it was based upon an election invalidated by the presence of a non-employee Union observer. The Board's policies specifically provide that "observers *must* be non-supervisory employees of the employer." [Emphasis supplied]

National Labor Relations Field Manual § 11310 (July, 1967 ed.). The Board has often stated that election proceedings must be conducted under "laboratory conditions," *General Shoe Corp.,* 77 NLRB 124, 126 (1948), and it, accordingly, has set aside elections where persons closely identified with the employer acted as observers. See cases cited in Board brief, p. 19. The Board has determined that, in such cases, a showing of actual interference with the free choice of any voter is "of no moment." *International Stamping Co., Inc.,* 97 NLRB 921, 923 (1951).

Since the Board must not discriminate between employers and unions in this regard, *Southwestern Elec. Service Co. v. NLRB,* 194 F.2d 939, 942 (5th Circuit 1952), since the presence of a non-employee union official acting as an observer is inherently restrictive upon the free choices of voters, since the employer made timely objection to the observer's presence, and since no rational explanation was offered or is apparent to excuse the Union's failure to select a non-supervisory employee as its observer, enforcement of the Board's order should be denied.

The Board's use of summary judgment in entering its order against Respondent renders its order unenforceable since the use of summary procedure is not authorized in, and is impliedly prohibited by, the Administrative Procedure Act, 5 U.S.C. §§ 554 (c), 556 (d), as well as by the National Labor Relations Act, 29 U.S.C. § 160 (b), and the Board's own Rules and Regulations, 29 C.F.R. §§ 102.24-102.92.

Assuming, without admitting, that the non-employee observer's presence at the election is itself insufficient to set aside the election, and even if the agency may utilize summary procedures in an unfair labor practice proceeding, it was nevertheless error to do so here. The Regional

Director's *ex parte* administrative investigation itself revealed substantial and material issues of fact as to voter intimidation by the Union observer. The Board relied upon his report in rendering its order without giving Respondent an opportunity to appear, argue, inspect evidence and cross-examine witnesses as required by due process of law and the Board's own rules. *NLRB v. Bata Shoe Co.*, 377 F.2d 821, 825, 826 (4th Cir. 1967), cert. denied, ... U.S. ....., 88 S.Ct. 238 (Oct. 23, 1967); *NLRB v. Capital Bakers, Inc.*, 351 F.2d 45, 50-52 (3rd Cir. 1965); NLRB Rules & Regs. § 102.69.

Argument

THE BOARD'S PETITION FOR ENFORCEMENT OF ITS ORDER DIRECTING RESPONDENT TO BARGAIN WITH TEAMSTERS' LOCAL NO. 960 SHOULD BE DENIED SINCE THE DETERMINATION OF THE APPROPRIATE BARGAINING UNIT, THE ELECTION AND SUBSEQUENT CERTIFICATION OF THE UNION, AND THE SUMMARY PROCEDURE USED BY THE BOARD WERE ALL IN VIOLATION OF GOVERNING LAW.

Since the unit determination, election and certification of the Union, and the summary judgment procedure exercised against Respondent were contrary to law and in excess of the Board's authority, Respondent's refusal to bargain with Teamsters' Local 960 did not constitute a violation of § 8 (a) (5) and (1) of the Act, 29 U.S.C. § 158 (a) (5) and (1).

A. In View of the History of Prior Bargaining on a Multi-Employer Basis, Previous Board-Approved Multi-Employer Unit Determinations, and the Existence of a Health and Welfare Plan Covering all Salesmen Within the Multi-Employer Unit: (1) the Multi-Employer Unit Was the Only Appropriate Unit for Purposes of Collective Bargaining; (2) the Board's Single-Employer Unit Determination Was "Arbitrary and Capricious"; and (3) the Board's Unit Determination Was "Controlled" by the Extent of Union Organization in Contravention of Section 9(c)(5) of the National Labor Relations Act.

While it is true, as pointed out by the Board, that the Board's determination of the appropriate unit for collective bargaining is "rarely to be disturbed," *Packard Motor Company v. NLRB,* 330 U.S. 485, 491 (1947), such a determination cannot be "arbitrary and capricious," *NLRB v. Merner Lumber and Hardware Co.* 345 F.2d 770, 771 (9th Cir.), cert. denied, 382 U.S. 942 (1965). Moreover, § 9 (c) (5) of the Act provides:

> "In determining whether a unit is appropriate for the purposes specified in subsection (b) of this section, the extent to which the employees have organized shall not be controlling." 29 U.S.C. § 159 (c) (5).

Respondent contends that the Board's unit determination in this case was both arbitrary and capricious, and was "controlled" by the extent to which the petitioning union had succeeded in organizing the employees of Respondent.

The acting Regional Director found that Respondent was engaged in the retail sale and service of new and used cars and trucks; that Respondent was a member of PADA, which since 1953 had bargained with Lodge 1414, International Association of Machinists, and Teamsters Union Locals 576 and 665 as representatives of PADA employees other than salesmen; that Local 775 of the Retail Clerks International Association was designated as representa-

tive of all the PADA salesmen in 1953 pursuant to a Board-ordered election; and that in 1958 Teamsters' Local 576 was designated as the salesmen's representative within the same multi-employer unit, although no collective bargaining contract ever ensued which covered the salesmen (R.14)[1].

Although not mentioned in the Regional Director's decision, the following facts were also established. PADA is comprised of approximately 50 car and truck dealerships located on the San Francisco peninsula and bounded by Daly City on the north and Mountain View to the south *(Peninsula Auto Dealers Assn. etc.,* 107 NLRB 56 (1953); Tr. 57-58). Since 1949, the California Association of Employers has been the bargaining agent for PADA. Each member of PADA agrees in writing to be bound by the terms of any bargaining agreement made by California Association of Employers with the approval of a majority of PADA's members (E.X.4; Tr. 18, 45-47).

In 1953, the Board granted the Retail Clerks' petition to represent all of the salesmen employed by PADA members, over an intervener union's objection that only single-employer units were appropriate. *Peninsula Auto Dealers Assn., etc., supra,* 107 NLRB 56. In 1958, the Board approved a stipulation entered into between PADA and Teamsters' Local 576, which designated all salesmen employed by PADA members as the appropriate unit (Tr. 10, 22). Therefore, while no contract was agreed upon as a result of the negotiations, collective bargaining between PADA and union representatives of the salesmen took place in 1953, and again in 1958.

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1. References designated "R." are to Volume I of the record. References designated "Tr." are to the reporter's transcript of testimony taken at the representation proceeding, Volume II of the record. References designated "E.X." are to exhibits of Respondent in the representation proceeding.

Also not mentioned in the Regional Director's decision was the fact that in August of 1963 a declaration of trust was entered into by PADA, Lodge 1414 of the International Association of Machinists, and Teamsters' Locals 576 and 665, covering a health and welfare program administered by the Motor Car Dealers Association of Northern California; and that all PADA salesmen were, at the time of the hearing, covered by a health and welfare plan administered by the same association (E.X.5; Tr. 19-20, 29-30).

In the face of these uncontroverted facts, the Board first seeks to justify its single-employer unit determination by referring to its "oft repeated and judicially approved rule that absent a controlling history of bargaining on a broader basis, a single employer unit is presumptively appropriate" (Board brief, p. 9). *NLRB v. American Steel Buck Corp.*, 227 F.2d 927, 929-930 (2nd Cir. 1955), the only court decision cited by the Board for this proposition, upheld a unit determination on the basis that "the record, as a whole, amply supports the Board's findings of fact." 227 F.2d at 929. No reference was made, expressly or impliedly, to any presumption employed by the Board. Perhaps some deference may be due to the Board's formulation of policies within the realm of its peculiar "expertise," but to canonize this policy without regard to the particular circumstances of the case is to contravene § 9 (b) of the Act which provides that "The Board shall decide *in each case*" the appropriate unit for the purposes of collective bargaining. [Emphasis supplied] 29 U.S.C. § 159 (b).

The indiscriminate use of such presumptions has been justly criticized. Note, *The Board and § 9(c)(5); Multi-location and Single-location Bargaining Units in the Insurance and Retail Industries,* 79 Harv. L. Rev. 811, 826-828 (1966). And the Supreme Court has recently denied certio-

rari in *NLRB v. Purity Food Stores, Inc.* 376 F.2d 497 (1st Cir.), cert. denied, ... U.S. ....., 88 S.Ct. 337 (Nov. 13, 1967), a case denying enforcement of a Board order under circumstances remarkably similar to those involved here, in which the Circuit Court stated that "The Board's simple declaration that single . . . units are considered 'presumptively appropriate' adds nothing . . ." 376 F.2d at 501.

The Board next seeks to avoid the importance of the now 15-year multi-employer bargaining history for all of the remaining employees of PADA members. It simply asserts its discretion to permit single-employer bargaining for certain employees, despite the presence of a larger bargaining unit in which other employees are represented.

But, while not invariably controlling, the bargaining history for one group of employees has been considered "persuasive" in determining the "question of appropriateness for every other group of employees." *NLRB v. Local 210, International Brotherhood of Teamsters, etc.,* 330 F.2d 46, 47 (2d Cir. 1964). And Board decisions have repeatedly noted the importance of this factor. See, e.g.: *Los Angeles Statler Hilton Hotel,* 129 NLRB 1349 (1961); *Joseph E. Seagram & Sons, Inc.* 101 NLRB 101 (1952); *Lone Star Producing Co.,* 85 NLRB 1137 (1949).

Moreover, the Board has consistently recognized the great importance of the same employee group's prior bargaining history in determining whether a multi-employer or single-employer unit is appropriate. See, e.g.: *NLRB v. Moss Amber Mfg. Co.,* 264 F.2d 107, 111 (9th Cir. 1959); *Travelers Ins. Co.,* 116 NLRB 387 (1956); *Berger Bros. Co.,* 116 NLRB 439 (1956); *Joseph E. Seagram & Sons, Inc., supra,* 101 NLRB 101. But the Board seeks to deprecate the fact that the salesmen within the PADA jurisdiction were represented by unions on a multi-employer basis first

in 1953 and again in 1958. It contends that this collective bargaining history is irrelevant because no bargaining contract was ever agreed upon between the PADA and the representative unions, in spite of their negotiations. The Board refines its rule to require a "successful" bargaining history, i.e., where formal collective bargaining contracts have been forthcoming.

Although the Board is charged with the duty of securing employee rights, it is not charged with the duty of seeing that every employee is covered by a formal contract, or of seeing to it that employee representatives are placed in the best possible bargaining position. See: *Amalgamated Utility Workers v. Consolidated Edison Co.*, 309 U.S. 261, 265 (1940); *NLRB v. West Texas Utilities Co.*, 214 F.2d 732, 740-741 (5th Cir. 1954). The Board's function is circumscribed by the Act, and, in determining the appropriate bargaining unit:

> "Consideration . . . should also be given to the consequences to employees similarly situated who apparently do not wish to unionize, but who would inevitably be affected, basically, by the union's activities . . . We believe, also, that there should be some minimum consideration given to the employer's side of the picture, the feasibility, and the disruptive effects of piecemeal unionization. Congress' appreciation of these factors we believe is evidenced by its passage of Section 9(c)(5) to the effect that the extent of organization is not the sole consideration." *NLRB v. Purity Food Stores, Inc.*, 354 F.2d 926, 931 (1st Cir. 1965). See Note, *The Board and Section 9(c)(5), supra,* 79 Harv. L. Rev. at 833 ff.

On remand, the Board itself "said that it was 'mindful' that unit findings ought not to ignore the desirability of accommodating the opportunity of employees to organize with

management's ability to run its business," and that it was in "complete agreement" with the principle that "there should be some minimum consideration given to the employer's side of the picture." *NLRB v. Purity Food Stores, Inc., supra,* 376 F.2d at 500.

In addition to the absence of a "successful" bargaining history, the Board points to the fact that no union is seeking to represent the salesmen on a multi-employer basis. It argues that in order to give the company's salesmen "the fullest freedom in exercising the rights guaranteed by this Act," 29 U.S.C. § 159 (b), the single-employer unit must be found appropriate because "not many employee groups can simultaneously mount an organizing campaign among employees at [numerous] plants," citing *Joseph E. Seagram & Sons, Inc., supra,* 101 NLRB at 103 (Board brief, p. 13). This marshalling of factors in support of the Board's unit determination is the clearest example of the correctness of Respondent's contention that the Board's unit determination was "controlled" by the extent of organization in violation of § 9 (c) (5) of the Act. 29 U.S.C. § 159 (c) (5). Factors used in the Board's unit approach here—the successful bargaining history requirement, the absence of a competing union, and the so-called recognition of union inability to organize large units—are all factors which are immediately or ultimately derived solely from the fact that the union has succeeded in organizing employees on a single dealership basis, while it apparently failed to do so on a multi-employer basis as did its sister local in 1958 and the clerk's union in 1953.

In *NLRB v. Metropolitan Life Insurance Company,* 380 U.S. 438 (1965), the Court approved the statutory test set forth by the National Labor Relations Board in its Twenty-Eighth Annual Report, page 51 (1963), as follows: "Al-

though extent of organization may be a factor evaluated, under Section 9 (c) (5) it cannot be given controlling weight." 380 U.S. at 442 n. 4. The interpretation to be given to the phrase "controlling weight" was set forth in the House Report on §9 (c) (5), which explicitly stated that although "The Board may take into consideration the extent to which employees have organized, this evidence should have little weight." H.R. Rep. No. 245, 80th Cong., 1st Sess. 37 (1947), quoted in Note, *The Board and Section 9(c)(5), supra,* 79 Harv. L. Rev. at 820.

Indeed, *NLRB v. Botany Worsted Mills,* 133 F.2d 876 (3rd Cir. 1943), one of the decisions criticized by the House of Representatives as being "controlled" by the extent of union organization, Note, *The Board and Section 9 (c) (5), supra,* 79 Harv. L. Rev. at 821, is analogous to the situation involved here. There, the Board had approved a unit consisting of only one department in a plant. *Botany Worsted Mills,* 27 NLRB 687 (1940). In enforcing this Order, the Court of Appeals cited the Board's reasons for its determination, which are essentially those here advanced by the Board, stating:

> "The evidence before the Board showed that at the time a majority of the sorter-trapper group manifested its desire for collective bargaining through union membership, the majority of the other employees of Botany did not belong to any union and that no labor organization had petitioned the Board for certification as the representative of the employees on a plant wide basis. The Board expressed the belief that the rights of the unit selected as appropriate should not have to be contingent upon what other employees in other parts of the plant did. There was evidence indicating that the unit designated was suffiently distinct from other groups of employees so as to make its selection as a separate unit feasible. The sorters or

> trappers worked in a part of the plant entirely or partly set apart from the process in which they are engaged and this department has its own supervisors. There is no interchange of employees engaged in sorting or trapping, except to the extent that when the process was changed 12 former sorters were transferred to other departments. We do not see any basis upon which the designation of the bargaining unit by the Board in this case should be interfered with by this Court." 133 F.2d at 880-881.

If, as the Board apparently now contends, it is precluded from weighing extent of organization in determining an appropriate unit *only* when it is the *sole* basis for the unit determination, the Board will have effectively succeeded in subverting the purposes of § 9(c)(5). The Board considers numerous other factors in determining the appropriate unit. Included, *inter alia,* are the employer's form of business organization, the history of labor relations, the form of present or past organization, eligibility of membership in the organization, employee desires, employee mutual interests, multi-employer organization and *modus operandi,* geographical distribution, and bargaining custom in the industry. Respondent submits that it would be a very rare case indeed in which one or more of these other factors, however insignificant they might be under the circumstances, could not be found to support a unit determination which in fact is based primarily upon the extent of union organization. See, generally: Note, *The Board and Section 9 (c) (5), supra,* 79 Harv. L. Rev. 811; CCH Labor Law Course ¶¶ 2075-2086.

On page 15 of its brief, the Board states that, assuming the multi-employer unit to be appropriate, "this would not put into question the propriety of the single-employer unit which the Union sought. There is no concept of a 'more'

or 'most' appropriate unit." The Board's brief apparently suggests that the Board is therefore bound by § 9(c)(5) only in determining whether a unit is "an" appropriate unit, and that it is not so bound in choosing "from among several appropriate units." This contention requires a strained and unnatural reading of the statute. The duty of the Board is to select *the* appropriate unit in each case, Act § 9(b); 29 U.S.C. § 159(b), and it is this determination alone which establishes the ultimate bargaining relationship of the parties. To impute an intent on the part of Congress not to apply § 9(c)(5) in the ultimate determination of the unit finds no basis in reason, legislative history, or the language of the Act.

Moreover, the absence of an articulated statement by the Board that its decision is determined by the extent of union organization is clearly immaterial in considering whether its decision was, in fact, so controlled. See *NLRB v. Metropolitan Life Ins. Co.,* 380 U.S. 438, 442 (1965), vacating and remanding *Metropolitan Life Ins. Co. v. NLRB,* 327 F.2d 906, 909-911 (1st Cir. 1964).

Respondent, therefore, contends that the Board has not only chosen an inappropriate unit in this case and that its determination is "arbitrary and capricious", but that it has acted in derogation of § 9(c)(5) under any of the tests of "controlling" which can reasonably be supported in light of the language and legislative history of that section. All but one of the arguments advanced by the Board to justify its unit determination are based upon the extent of Union organization; the remaining "presumption" favoring single-employer units "adds nothing". The factors favoring a PADA association-wide unit need not be repeated. And perhaps the most telling fact compelling denial of enforcement here is that in 1953 the Board rejected the demand

of Teamster Local 111 for a single unit, and designated the association-wide unit as appropriate. *Peninsula Auto Dealers Assn., etc., supra,* 107 NLRB 56. See *NLRB v. Groendyke Transport, Inc.,* 372 F.2d 137, 141, (10th Cir. 1967). Since 1953, the only changed circumstances which have arisen, exclusive of the extent of union organization, is the history of collective bargaining by representatives of the salesmen on a multi-employer basis on two separate occasions, and continued bargaining on that basis for all other employees of PADA members.

At the very least, this matter should be remanded to the Board for further proceedings in view of the lack of articulated bases for its decision. In *NLRB v. Metropolitan Life Ins. Co.,* 380 U.S. 438 (1965), Justice Goldberg, writing for the Court, noted that the Board stated the grounds for its unit determination as follows:

> " 'The Employer has eight district offices and two detached offices in Rhode Island, and has only one district office in Woonsocket. The nearest district office is located 12 miles away in Pawtucket. In the prior proceeding . . ., we found that each of the Employer's individual district offices was in effect a separate administrative entity through which the Employer conducted its business operations, and therefore was inherently appropriate for purposes of collective bargaining . . . [W]e find that, since there is no recent history of collective bargaining, no union seeking a larger unit, and the district office sought is located in a separate and distinct geographical area, the employees located at the Woonsocket district office constitute an appropriate unit.' " 380 U.S. at 442 n. 5.

The Supreme Court went on to state, at pp. 442-444:

> ". . . due to the Board's lack of articulated reasons for the decisions in and distinctions among these cases, the Board's action here cannot be properly reviewed.

> When the Board so exercises the discretion given to it by Congress, it must 'disclose the basis of its order' and 'give clear indication that it has exercised the discretion with which Congress has empowered it.' *Phelps Dodge Corp. v. National Labor Relations Board,* 313 U.S. 177, 197."

Both here and in *Metropolitan Life,* the Board failed to adequately explain its departure from prior decisions. In the instant case, the Board's articulated reasons for its decision fall far short of the expressed bases on which the Board rendered its order in the *Metropolitan Life* case, and which the Supreme Court found wanting. But here, the Board has had ample opportunity to review its decision following the publication of the Supreme Court's opinion in *Metropolitan Life.* It should not now be allowed to revise and restate its Order, thereby causing further delays and expense. Compare *NLRB v. Purity Food Stores, Inc., supra,* 354 F.2d 926 (remand to Board), with *NLRB v. Purity Food Stores, Inc., supra,* 376 F.2d 497 (enforcement denied). As stated by Justice Douglas in his dissenting opinion in *Metropolitan Life,* 380 U.S. at 444:

> "A reading of the court's opinion reveals the fallacies on which the Board proceeded. The employer sought review of the Board's Order, asking that it be set aside. Concededly it should be. But we need not act as amicus for the Board, telling it what to do. The Board is powerful and resourceful and can start over again should it wish . . . Neither of the parties asks for a remand. They are willing to stand or fall on the present record; and we should resolve the controversy in that posture."

B. The Election Was Invalid Since the Board Allowed a Non-Employee Union Officer to Act as the Union's Observer Contrary to the Board's Own Rules, and Over Respondent's Timely Objection.

Over Respondent's objection at the pre-election conference, the Union was permitted to designate as its election observer a Union official who was not an employee of the Company (R. 31, 34).

The Rules and Regulations and Statement of Procedure of the Board provide, in § 102.68, that "any party may be represented by observers of his own selection, subject to such limitations as the Regional Director may prescribe." 29 C.F.R. § 102.68. Section 11310 of the National Labor Relations Field Manual (July, 1967 ed.), made available to the public by the Public Information Act, P.L. 90-23, 81 Stat. 54 (1967), states that "observers *must* be non-supervisory employees of the employer, unless a written agreement by the parties provides otherwise." [Emphasis supplied]. The failure of the Board to conform to its own standards in this respect is particularly glaring in light of its affirmation that:

> "Our function, as we see it, is to conduct elections in which the employees have the opportunity to cast their ballots for or against a labor organization in an atmosphere conducive to the sober and informed exercise of the franchise, free not only from interference, restraint, or coercion violative of the Act, but also from other elements which prevent or impede a reasoned choice." *Sewell Manufacturing Co.*, 138 NLRB 66, 70 (1962);

and that

> "In election proceedings, it is the Board's function to provide a laboratory in which an experiment may be conducted, under conditions as nearly ideal as possible, to determine the uninhibited desires of the employees.

> It is our duty to establish those conditions; it is also our duty to determine whether they have been fulfilled. When, in the rare extreme case, the standard drops too low, because of our fault . . ., or that of others, the requisite laboratory conditions are not present and the experiment must be conducted over again." *General Shoe Corp.*, 77 NLRB 124, 126 (1948).

It is true that the cases cited by the Board support its position that the use of an employee observer who is also a paid union official or organizer will not be deemed sufficient in and of itself to void an election (Board brief, p. 18). But these cases do not, as stated by the Board, have any bearing upon whether a *non-employee* union official may properly act as a watcher at the election polls. All of the decisions cited by the Board involved union observers who were in fact employees of the employer. *NLRB v. Zelrich,* 344 F.2d 1011, 1014-1015 (5th Cir. 1965) (recently fired employee subject to reinstatement because of employer unfair labor practice in his dismissal); *Shoreline Enterprises of America,* 114 NLRB 716, 718-719 (1955) (employee), enforcement denied, *Shoreline Enterprises of America, Inc. v. NLRB,* 262 F.2d 933 (5th Cir. 1959); *Huntsville Mfg. Co.,* 99 NLRB 713, 730 (1952) (employee), enforced *NLRB v. Huntsville Mfg. Co.,* 203 F.2d 430 (5th Cir. 1953). In fact, the Board has refused to overturn a Regional Director's decision precluding the use of non-employee union observers, even where the union was unable to secure volunteers from among the employees. *Jat Transportation Corp.,* 131 NLRB 122, 125-126 (1961).

It is also true, as pointed out by the Board (brief, pp. 19-20), that "The control of the election proceeding, and the determination of the steps necessary to conduct that election fairly were matters which Congress entrusted to the Board alone." *NLRB v. Waterman S.S. Corp.,* 309 U.S.

206, 226 (1940). However, the Supreme Court there also said that it was "the intention of Congress to apply an orderly, informed and specialized procedure to the complex, administrative problems arising in the solution of industrial disputes." 309 U.S. at 208. See *NLRB v. A. J. Tower Co.*, 329 U.S. 324, 330-331 (1946). The function of the Courts in reviewing the validity of representation elections was elaborated by the Seventh Circuit:

> "Judicial review in these cases is not concerned with the wisdom of the Board's policy but must determine whether the record as a whole supports the findings and conclusions respecting compliance with the policies, rules, and regulations promulgated by the Board." *Celanese Corp. of America v. NLRB,* 291 F.2d 224, 225 (7th Cir. 1961).

Respondent is not contesting the validity or applicability of the Board's ruling that observers must be chosen from among employees of the employer. On the contrary, Respondent contends that once a procedure has been adopted by the Board it cannot with impunity disregard what it has determined to be "an orderly, informed and specialized procedure." Certainly such a departure from its ordinary procedures is unwarranted where there are no unusual factors which would affect the applicability of its rules and where the contesting party, as here, made timely and sufficient demand for compliance with the procedure at the pre-election conference. Cf. *NLRB v. Huntsville Mfg. Co., supra,* 203 F.2d at 434. The Board can hardly contend that observers favorable to the union were not available from among the employees, in view of the election results in favor of the Union. Moreover, the primary purpose for providing election observers chosen by organizations appearing on the ballot is to identify and make certain that those voting are qualified to do so. See: *NLRB v. West Texas Utilities*

Co., 214 F.2d 732 (5th Cir. 1954); *Balfre Gear & Mfg. Co.*, 115 NLRB 19 (1956); NLRB "Instructions to Election Observers", Form NLRB-722, LRX 4309. A union official employed in another county is scarcely competent to exercise these functions.

The Board also argues that Respondent must have made some particular showing of special circumstances, such as improper electioneering by the Union observer, in order to find that his presence tainted the election process. But Respondent contends that the mere presence of such an observer compels the inference that a free election was thereby precluded. Election observers watch the employees as they come to vote, check off their names on the eligibility list, challenge them if they so desire, and watch the voters deposit their ballots in the ballot box. When the observer is an "outsider" unknown to the employees, and who obviously represents the Union, his mere presence must be deemed to arouse sufficient fears among the voters to void the election. The Regional Director's observation that Banner wore no Union insignia is of little, if any, weight in view of the Board's prior recognition that, even in the absence of labels, the affiliation of election observers is "generally well known to the employees." *Western Electric Co., Inc.*, 87 NLRB 183, 185 (1949). See *Firestone Tire & Rubber Co.*, 120 NLRB 1644 (1958). The Board itself has rejected the requirement that a specific showing of intimidation be made. In *International Stamping Co., Inc.*, 97 NLRB 921 (1951) it set aside an election and directed that a new election be held where the employer's observers were the son and sister-in-law of the employer's president. There, the Board declared:

> "In the interest of free elections, it has long been the Board's policy to prohibit persons closely identified with an Employer from acting as observers . . . *the fact that there is no showing of actual interference*

with the free choice of any voter or that no objection was raised at the time of the election *is of no moment.*

"As this Board said in a closely related situation, 'confidence in, and respect for established Board election procedures cannot be promoted by permitting the kind of conduct involved herein to stand.' [Peabody Engineering Co., 95 NLRB 952] Election rules which are designed to guarantee free choice must be strictly enforced against material breaches in every case, or they may as well be abandoned. We believe that the purposes of the Act would best be served by setting aside the instant election and directing a new one." [Emphasis supplied] 97 NLRB at 923.

The Board has repeatedly upheld the refusal of its Regional Directors to allow persons closely identified with the employer to act as its observer, and has set aside elections where such an observer has been used at the polls. See cases cited in Board brief, p. 19. And in *Southwestern Electric Service Co. v. NLRB,* 194 F.2d 939 (5th Cir. 1952), the court found that where a union official, not an employee of the company at which a certification election was being held, appeared and talked to voters in the polling area, the election would have to be set aside. Although the blatant electioneering on the part of the union official in that case may be absent in this, here the union official was not only present at the polling place, but was wearing an official observer's badge, thereby being clothed with a measure of respectability and implied Board approval not present in the *Southwestern Electric* case.

But the Board now seeks to explain the discrimination in its treatment of employer and union observers by stating that the courts have agreed that "generally union spokesmen may be distinguished from managerial officials, for the latter's immediate power to alter working condition[s] raises a risk of subtle pressures during the voting process"

(Board brief, p. 18). It is true that the Board itself has taken this position, but no court decisions favoring such a distinction have been cited. In fact, the Court in *Southwestern Electric Service Co. v. NLRB, supra,* 194 F.2d at 942, stated:

> "If the tables were turned, and a representative of the Company had done exactly what was done here, with a result favorable to the employer, the election should be set aside; and the *same rule* must apply in this case, where a free and fair election was interfered with by the activities of the union representative within the prohibited area." [Emphasis supplied]

The Board's view of the relative abilities of employers and unions to apply "subtle pressures during the voting process", and its application of stricter standards for the employer have been characterized as outdated and worthy of being discarded. Note, 38 Temple L.Q. 288, 298 (1965). And the fact that the election has been conducted at "considerable pains and expense" to the Board (R. 35) is also irrelevant. This is particularly true where, as here, the company made its objection known when first advised of the observer's identity, and in ample time to allow compliance with the Board's policy.

To here sanction the use of the non-employee Union observer and approve the certification of a bargaining representative based upon the election would run counter to the purposes and policies inherent in a democratic administrative process. The Field Manual provides that observers *must* be selected from among the non-supervisory employees of the employer, and this procedure has been consistently applied by the Board. See Kammholz and McGuiness, ALI Practice and Procedure before the NLRB, p. 35 (1962). The Board has repeatedly stated that elec-

tions are to be conducted under "laboratory" conditions. Observers closely identified with the employer have been precluded from serving as observers, and elections conducted in their presence have been set aside. Respondent made timely and repeated objections to the presence of this observer. No rational explanation was offered or is readily apparent to excuse the failure to select a non-supervisory employee as the Union's observer. In view of the foregoing, the Board's petition for enforcement should be denied.

C. The Board's Use of Summary Judgment Procedure in Rendering Its Order Was Improper.

As stated above, Respondent objected at the pre-election conference to the Regional Director's allowance of a non-employee to serve as the Union observer. After the election, a formal objection was lodged which was overruled by the Regional Director after an *ex parte* administrative investigation (R. 31, 33). The company's request for review of the decision was summarily denied by the Board, as was its request for reconsideration of the denial (R. 37, 42, 43, 45).

Respondent refused to bargain with the Union certified by the Board and consequently a complaint was issued charging Respondent with an unfair labor practice (R. 50). Respondent answered, generally denying the allegations of the complaint (R. 56). Thereupon, and before the scheduled hearing set for July 12, 1966, the General Counsel sought and obtained a "summary judgment" against Respondent (R. 86).

In support of its motion for summary judgment, General Counsel directed the Board's attention to the Supplemental Decision and Certification of Representative issued by the

Regional Director (R. 76; R. 33), wherein the Regional Director found that Wallace L. Banner, Jr., served as the Union's observer at the elections; that the Employer objected thereto; and that the Board agent permitted Banner to serve in spite of the objection. The Regional Director also found that Banner was an elected vice-president and member of the Union's executive board, and that he was employed as an automobile salesman in San Francisco, outside the geographical limits of PADA (R. 34; Tr. 57-58). The Regional Director determined, on the basis of his findings that Banner wore no Union insignia and that he spoke to none of the voters in the course of the election, that "the Employer's objection therefore is found to be without merit." (R. 34-35).

1. NEITHER THE ADMINISTRATIVE PROCEDURE ACT, THE NATIONAL LABOR RELATIONS ACT, NOR THE BOARD'S OWN RULES AND REGULATIONS AUTHORIZE THE BOARD'S USE OF A SUMMARY JUDGMENT PROCEDURE IN AN UNFAIR LABOR PRACTICE PROCEEDING.

The Administrative Procedure Act, National Labor Relations Act, and the Board's own Rules and Regulations and Statement of Procedure make no mention of, or provision for, the disposition of matters by the use of summary judgment proceedings. In fact, the use of this extraordinary procedure is impliedly prohibited.

Section 5 of the Administrative Procedure Act, 5 U.S.C. § 554, sets forth general requirements for adjudicatory proceedings required to be determined on the record after an opportunity for agency hearing. And § 7(c) provides that where hearings are required thereunder by § 5:

> "A party is entitled to present his case or defense by oral or documentary evidence, to submit rebuttal evidence, and to conduct cross-examination as may be required for a full and true disclosure of the facts." 5 U.S.C. § 556(d).

Section 10(b) of the National Labor Relations Act requires that an unfair labor practice complaint contain a "notice of hearing before the Board . . . or before a designated agent or agency," and the person against whom the complaint is issued is given the right "to appear in person or otherwise and give testimony." 29 U.S.C. § 160(b). See: *Amalgamated Utility Workers v. Consolidated Edison Co.,* 309 U.S. 261, 264 (1940); *Marine Engineers' Beneficial Assn. v. NLRB,* 202 F.2d 546, 548-549 (3rd Cir. 1953).

Respondent's contention is further supported by the fact that in adjudicatory agency proceedings, questions of policy are often presented upon which the Board does and should receive arguments and statements of counsel. See 1 Davis, Administrative Law §§ 7.02, 7.07 (1958). In recognition of this fact, the Administrative Procedure Act provides that:

> "The agency shall give all interested parties opportunity for—(1) the submission and consideration of facts, *arguments,* offers of settlement, or proposals of adjustment where time, the nature of the proceeding, and the public interest permit. . . ." [Emphasis supplied] 5 U.S.C. § 554(c).

The Board relies upon its rules providing generally for pre-hearing motions in order to support its use of motions for summary judgment. NLRB Rules & Regs., § 102.24, 29 C.F.R. § 102.24. However, a perusal of §§ 102.28 and 102.92 of the Rules and Regulations clearly demonstrates that the motions allowed in § 102.24 refer only to procedural matters not affecting the ultimate disposition on the merits. 29 C.F.R. §§ 102.28, 102.92. Moreover, § 102.27 specifically provides for a motion to dismiss the entire complaint, and § 102.26 provides that unless otherwise expressly authorized, rulings on motions by the Regional Director or Trial Examiner "shall not be appealed directly to the Board

except by special permission of the Board, but shall be considered by the Board in reviewing the record . . .," thereby indicating the exclusion of the extraordinary motion for a summary judgment under § 102.24. 29 C.F.R. §§ 102.24, 102.26, 102.27.

Even if allowed by the Administrative Procedure Act and the National Labor Relations Act, Respondent contends that, at least in the absence of a Board rule duly adopted pursuant to 5 U.S.C. § 553, the Board may not use the extraordinary procedure of summary judgment.

2. EVEN IF THE BOARD MAY RENDER SUMMARY JUDGMENT ON AN UNFAIR LABOR PRACTICE COMPLAINT, IT WAS ERROR TO DO SO WHERE SUBSTANTIAL AND MATERIAL ISSUES OF FACT WERE PRESENTED TO THE BOARD.

If this Court should find that the Board may properly utilize summary procedure, in spite of the absence of statutory authority and the lack of opportunity on the part of Respondent for cross-examination and presentation of oral argument, it is still clear that such a procedure conforms to the requirements of due process only where no disputed issues of material fact are presented. See, e.g.: *Macomb Pottery Co. v. NLRB,* 376 F.2d 450, 452 (7th Cir. 1967).

Respondent, admittedly, could have proferred no evidence in the unfair labor practice proceeding on the question of the proper unit determination which was not available to it at the pre-election hearing. However, Respondent submits that there were genuine and material issues of fact presented as to the validity of the election and subsequent certification of the Union representative based upon Respondent's objections to the use of the non-employee Union observer at the polls. As to this issue, the Board's order was rendered solely upon the basis of the Regional Director's supplemental decision and certification. This

decision was rendered upon the Regional Director's *ex parte* administrative investigation under § 102.69 of the Rules and Regulations, 29 C.F.R. § 102.69, which was conducted without opportunity for Respondent to be heard, to present evidence, or to cross-examine persons giving testimony to the Regional Director.

This Court has repeatedly warned of the dangers of entering summary judgment in civil actions under Fed. R. Civ. P. 56, referring to it as a "drastic remedy", *Consolidated Electric Co. v. United States,* 355 F.2d 437, 438 (9th Cir. 1966), to be rendered only "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact." Fed. R. Civ. P. 56(c). And:

> "An issue of fact may arise from inferences to be drawn from the evidence, and all doubts as to the existence of a genuine issue as to a material fact must be resolved against the party moving for a summary judgment." *United States ex rel. Austin v. Western Electric Co.,* 377 F.2d 568, 572 n. 11 (9th Cir. 1964). See also: *Cameron v. Vancouver Plywood Corp.,* 266 F.2d 535, 539 (9th Cir. 1959); *Hoffman v. Babbit Brothers Trading Co.,* 203 F.2d 636, 638 n. 1 (9th Cir. 1953); Wright, Federal Courts § 99 (1963).

At the very least, the presence of a non-employee Union observer at the election polls gives rise to the inference that the election was not conducted under the "laboratory" conditions so frequently espoused by the Board.

Remarkably similar issues were presented to the Third Circuit in the case of *NLRB v. Capital Bakers, Inc.,* 351 F.2d 45, 50-52 (3d Cir. 1965). There, the question involved respondent company's objection to the union's election challenge of an employee. After noting the provisions of

the Board's Rules and Regulations, § 102.69(c), providing that the Regional Director may conduct a hearing where substantial and material factual issues are presented, the Court found that the Regional Director's report itself established the existence of such "substantial and material factual issues." 29 C.F.R. § 102.69(c). And the Court declared that "all of the evidence upon which he relied is derived from statements which were not subject to cross-examination or confrontation or to any legal tests for determining their use or weight as evidence." 351 F.2d at 50. Then, after citing the provisions for a hearing contained in § 10(b) of the Act and § 102.69(e) of the Rules and Regulations, the Court stated:

> "It is apparent that the status of the employee whose ballot was challenged presents a substantial factual issue. The extent of the Regional Director's discussion of facts attests to its substance . . . Therefore, the failure to determine this issue on the basis of a hearing constitutes a clear abuse of discretion on the part of the Regional Director, which has been allowed to stand at the successive stages of the proceedings on the grounds that the original determination was not open to subsequent review. Not only the Rules and Regulations, but due process of law demands that a hearing be held on this contested factual issue at some stage of the administrative proceeding before respondent's rights can be affected by an enforcement Order." *NLRB v. Capital Bakers, Inc., supra,* 351 F.2d at 51. Accord: *NLRB v. Bata Shoe Co.,* 377 F.2d 821, 825-826 (4th Cir. 1967); *NLRB v. Lamar Elec. Membership Corp.,* 362 F.2d 505 (5th Cir. 1966); *International Ladies Garment Workers Union v. NLRB,* 339 F.2d 116, 124-125 (2nd Cir. 1964); *NLRB v. Air Control Products of St. Petersburg, Inc.,* 335 F.2d 245, 249 (5th Cir. 1964); *NLRB v. Ideal Laundry and Dry Cleaning Co.,* 330 F.2d 712, 715-716 (10th Cir. 1964); *NLRB v. Joclin Mfg. Co.,* 314 F.2d 627, 630-633 (2nd

Cir. 1963); *NLRB v. Lord Baltimore Press, Inc.*, 300 F.2d 671 (4th Cir. 1962); *NLRB v. Poinsett Lumber & Mfg. Co.*, 221 F.2d 121 (4th Cir. 1955); *NLRB Rules and Regulations* § 102.69, 29 C.F.R. § 102.69. Cf. *NLRB v. Sun Drug Co.*, 359 F.2d 408 (4th Cir. 1966).

§ 102.69(c) of the NLRB Rules and Regulations provides, in part, that the Regional Director's decision on objections to election "may be . . ., if it appears to the regional director that substantial and material factual issues exist which can be resolved only after a hearing, on the basis of a hearing before a hearing officer. . . ." 29 C.F.R. § 102.69(c). But:

> "The Board properly has not contended either that the Regulations' use of the phrase 'appears to the Board' makes its determination conclusive . . ., or that their use of the verb 'may' gives it an unfettered discretion to grant or deny a hearing. . . ." *NLRB v. Joclin Mfg. Co., supra,* 314 F.2d at 621.

Here, the Regional Director's investigation "itself reveals . . . that material factual issues exist which can be resolved only by a hearing," *U.S. Rubber Co. v. NLRB,* 373 F.2d 602, 606 (5th Cir. 1967), in that the observer was one of the Union's officers who was not an employee of respondent company. If the use of such an observer is not sufficient in and of itself to void the election, and even if, as contended by the Board, special circumstances such as improper electioneering are necessary to set aside the election, the presence of such an observer must be held to establish a *prima facie* showing of such "special circumstances" sufficient to require a hearing. See: *NLRB v. Bata Shoe Co., supra,* 377 F.2d at 826; *NLRB v. Lamar Elec. Membership Corp., supra,* 362 F.2d at 508; *Jat Transportation Corp., supra,* 131 NLRB 122.

At the very least, then, Respondent must be given the opportunity to confront and cross-examine witnesses and inspect evidence relied upon by the Regional Director in making his *ex parte* investigation and report, which in turn was relied upon by the Board in entering its summary judgment. *NLRB v. Indiana and Michigan Elec. Co.,* 318 U.S. 9, 28 (1943); *NLRB v. Poinsett Lumber & Mfg. Co., supra,* 221 F.2d at 123.

CONCLUSION

For the reasons stated above, it is respectfully submitted that the Board's petition for enforcement of its order should be denied or, in the alternative, that this matter should be remanded to the Board for further proceedings in light of *NLRB v. Metropolitan Life Ins. Co., supra,* 380 U.S. 438, and for hearing on Respondent's objections to the election in accordance with NLRB Rules and Regulations § 102.69 (c), 29 C.F.R. § 102.69(c).

Dated: December 28, 1967

Respectfully submitted,

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CERTIFICATE

I certify that, in connection with the preparation of this brief, I have examined Rules 18 and 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

NATHAN R. BERKE

Attorney

No. 21,888

In the United States Court of Appeals for the Ninth Circuit

NATIONAL LABOR RELATIONS BOARD, PETITIONER

and

CASCADE EMPLOYERS ASSOCIATION, INC., INTERVENOR

v.

SALEM BUILDING TRADES COUNCIL, AFL-CIO,

RESPONDENT

ON PETITION FOR ENFORCEMENT OF AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

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BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

JURISDICTION

This case is before the Court upon the petition of the Board, pursuant to Section 10(e) of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C., Sec. 151 *et seq.*),[1] for enforcement of its order issued against respondent on February 20, 1967 (R. 32–43) [2] and reported at 163 NLRB No. 9. This Court has jurisdiction of the proceeding, the unfair labor practices having occurred in Salem, Oregon, within this judicial circuit.

[1] Pertinent provisions of the Act are set forth *infra*, pp. 25–26.

[2] "R." references are to pages of Volume I of the record as reproduced according to Rule 10 of the Rules of this Court.

STATEMENT OF THE CASE

I. The Board's Findings of Fact [3]

The Board found that respondent Salem Building Trades Council (hereinafter, "the Union") was engaged in a labor dispute with a general contractor in the building industry. The Board further found that the Union picketed at the premises of neutral employers with an object of forcing those employers, and other persons who regularly do business with the general contractor, to cease doing business with the general contractor, in violation of Section 8(b)(4)(ii)(B) of the Act. The subsidiary facts may be summarized as follows:

Since January 1963, the Union has had a labor dispute with Reimann Construction Co., a general contractor in the building and construction industry, over the wages and working conditions of laborers employed by Reimann (R. 34; 24). In April 1965, Reimann was engaged by Northbridge Industries—owner and operator of a chain of motels—to build a new motel called the Hyatt Lodge (R. 33, 34; 23–24). Thereafter, the Union notified the Oregon State Building and Construction Trades Council (a labor organization), of Reimann's presence on the Hyatt Lodge project. On May 27, 1965, the Oregon State Building and Construction Trades Council informed Northridge by letter that Reimann was considered an "unfair" employer by both the Oregon State Council and the Union.

[3] The facts in this case are undisputed. Before the Board, the parties entered into a stipulation of facts, waived proceedings before a Trial Examiner, and agreed that the case could be submitted directly to the Board itself for decision (R. 22).

The letter added that unless nonunion firms were removed from the Hyatt Lodge project, Northridge itself could be placed "on the official unfair list and do not patronize list of the entire labor movement in the State of Oregon" (R. 24–25; 29).

Reimann was not removed from the Hyatt Lodge project, however. It completed its contract for Northridge using nonunion carpenters and laborers, and left the premises on October 11, 1965. Hyatt Lodge thereupon opened for business (R. 34; 25). The Union did not picket the premises during the construction period, nor was Northridge placed on any unfair list or do not patronize list by any Oregon labor organization (R. 25).

Candelaria Investment Co. is an Oregon corporation; it owns, operates and leases retail store buildings at a location called the Candelaria Shopping Center in Salem, Oregon. In June 1965, Candelaria engaged Reimann to construct a building at the Shopping Center. Reimann also performed this contract with nonunion carpenters and laborers, and completed work by October 14, 1965 (R. 34; 25, 30). Candelaria's tenant at the new building was Farrell's Ice Cream Parlor; Farrell began retail operations on November 9, 1965 (*Ibid.*).

It was undisputed that the Union had no labor dispute with Northridge, Hyatt Lodge, Farrell, or Candelaria (R. 34; 24). Nonetheless, from November 8 to December 20, 1965, the Union picketed at the premises of Hyatt Lodge; and between November 9 and November 15, 1965, the Union picketed sporadically at Farrell's premises (R. 34–35; 25, 26). At both

locations, the picketing did not begin until after Reimann and his employees had permanently left the premises (R. 35; 25). At both locations, the picketing occurred during regular business hours while the occupant of the premises was engaged in normal business operations. The pickets, who confined their patrolling to the area around the customer or consumer entrances, carried picket signs displaying the following legend (R. 35; 25–26):

THIS
BUILDING
BUILT UNDER
SUB-STANDARD
WAGES AND CONDITIONS
BY
REIMANN CONSTRUCTION COMPANY

SALEM BUILDING TRADES COUNCIL

The picketing did not cause any cessation of work by employees working at the picketed premises or by deliverymen servicing those establishments (R. 27).

Hyatt Lodge and Reimann are members of Cascade Employers Association, Inc. The Association filed the instant unfair labor practice charges on their behalf and the General Counsel issued the instant complaint on December 17, 1965. After the General Counsel had commenced proceedings under Section 10(1) of the Act in the United States District Court for the District of Oregon, the parties entered into a stipulation on December 20, 1965, pending final disposition of the complaint by the Board, and the picketing stopped (R. 25).

II. The Board's Conclusions and Order

The Board concluded that the Union's picketing violated Section 8 (b)(4)(ii)(B) of the Act. In the Board's view, the record in this case showed that an object of the picketing, which concededly occurred at the premises of neutral employers, was to force them and other persons to cease doing business with Reimann. In so ruling, the Board rejected the Union's contentions that (1) no violation could be found here because there was no existing business relationship between Reimann and the other employers involved (R. 35–37); (2) the U.S. Constitution privileged the picketing because it had an "informational" purpose (R. 35); and (3) the picketing was immunized by the Supreme Court's consumer picketing doctrine enunciated in *N.L.R.B.* v. *Fruit & Vegetable Packers Local 760* (*Tree Fruits*), 377 U.S. 58 (R. 37, 39).

Accordingly, the Board ordered the Union to cease and desist from threatening, coercing or restraining the named employers or any other persons with an object of forcing them to cease using Reimann's products or to cease doing business with Reimann in a manner prohibited by Section 8(b)(4)(ii)(B). The order also requires the Union to post an appropriate notice at its business offices and meeting halls in Salem, and to provide signed copies of the notice for the named employers to post at their premises.

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ARGUMENT

The Board properly found that the union threatened, coerced, and restrained neutral persons with an object of forcing them to cease using Reimann's products, or to cease doing business with Reimann, thereby violating Section 8(b)(4)(ii)(B)

The stipulated facts establish that the Union had a labor dispute with Reimann, a building contractor; that it engaged in picketing at retail premises built by Reimann after the latter and his employees had completed their work and left the premises; and that the picketed premises were then being operated by other, admittedly neutral, employers. At first blush, therefore, this case presents a classic situation cognizable under Section 8(b)(4)(B). For that statutory provision, as the Supreme Court has only recently reiterated, was designed to prohibit "pressure tactically directed toward a neutral employer in a labor dispute not his own." *National Woodwork Mfrs. Ass'n et al.* v. *N.L.R.B.*, 386 U.S. 612, 623.[4]

The occurrence of picketing at premises occupied solely by neutral employers usually gives obvious and persuasive support to an inference that the union was deliberately seeking to enmesh innocents in its dispute with the primary employer. Nonetheless, the Union contended before the Board, its conduct in

[4] Section 8(b)(4)(B), formerly Section 8(b)(4)(A), makes it an unfair labor practice for a union to "induce or encourage" neutral employees to engage in a work stoppage or to "threaten, coerce, or restrain" a neutral employer, with an object of forcing "any person to cease using, selling, handling, transporting, or otherwise dealing in the products of any other producer, processor, or manufacturer, or to cease doing business with any other person." The full text of Section 8(b)(4)(B) and other relevant statutory provisions appears *infra*, pp. 25–26.

this case was lawful. We shall discuss each of the Union's arguments *seriatim*.

A. The contention that the Union did not "threaten, coerce or restrain" the picketed employers

Before the Board, the Union contended that the record would not permit a finding that it had engaged in the precise kinds of conduct described in Section 8(b)(4)(B). Specifically, the Union argued, there could be no finding that the neutral employers were threatened, coerced or restrained within the meaning of subsection (ii) of 8(b)(4)(B) because there was no proof of injury or adverse effect to them as a result of the picketing.[5]

The legislative history of this subsection and its uniform interpretation by the Board and courts compel the rejection of the Union's argument.

Under the law before the 1959 amendments, a union was not permitted to call a strike at a neutral employer's premises in support of a forbidden cease-doing-business object; however, nothing in the Act prevented a union from approaching the neutral employer directly and threatening him with labor troubles in order to achieve the same boycott results. Congress sought to eliminate this loophole by adding subsection (ii) to the Act in 1959. *N.L.R.B.* v. *Servette, Inc.*, 377 U.S. 46, 51–54. Legislative history makes it clear that Congress sought to reach all those

[5] The Union also contended that their picketing was not calculated to invite the neutral employees to make common cause by engaging in work stoppages. The Board agreed that proof of "inducement" within the meaning of Section 8(b)(4)(i)(B) was insufficient and the Board dismissed this allegation of the complaint.

forms of union conduct which, unlike mere peaceful persuasion, subject the neutral employer to an effective loss of his freedom of choice by threat of a separate strike, picketing or other like economic retaliation.

Senator McClellan, who introduced the amendment from which subsection (ii) derives, made its applicability to this very case explicit:

> The amendment covers the direct coercion of secondary employers to cause them to cease dealing with or doing business with the primary employer. In other words, if there were a strike in a certain plant, and I, as a merchant, handled the products of that plant, under the amendment the union *could not use picketing* to try to compel me to cease handling the products of the plant where the labor dispute is under way. II *Legislative History of the Labor-Management Reporting & Disclosure Act of 1959*, (G.P.O. 1959), p. 1193 (emphasis supplied).

Thus, the short answer to the Union's argument is that no proof of actual injury or adverse effects is necessary: Congress itself has decided that picketing of a neutral employer, with qualifications discussed *infra,* pp. 18–20, is encompassed by subsection (ii). The Board and the courts in cases arising under this provision, have uniformly interpreted it in a manner consistent with its application here. *N.L.R.B.* v. *International Hod Carriers, etc. Local 1140,* 285 F. 2d 397, 398–399, 402 (C.A. 8) cert. den., 366 U.S. 903; *N.L.R.B.* v. *Highway Truckdrivers and Helpers, Local 107,* 300 F. 2d 317, 320–321 (C.A. 3); *N.L.R.B.* v. *Local 825 Operating Engineers,* 315 F. 2d 695, 697

(C.A. 3); *N.L.R.B.* v. *District Council of Painters No. 48,* 340 F. 2d 107, 111 (C.A. 9); *Building & Const. Trades Council of San Bernardino and Riverside Counties, et al.* v. *N.L.R.B.,* 328 F. 2d 540 (C.A. D.C.).

B. The contention that an existing business relationship between the primary and secondary employees is a prerequisite to finding a Section 8(b)(4)(B) violation

The Union contended before the Board that the finding of a Section 8(b)(4)(B) violation in this case was precluded because the forbidden object described by the Act was to force one person to "cease doing business" with another. Here, the Union asserted, Reimann had already completed his contract before the Union began its picketing at the neutral employers' premises and there was no evidence that the latter had any specific plans to do business with Reimann in the future. Hence, the argument went, no cessation of business object could be shown. The Board rejected this argument, concluding that Section 8(b)(4)(B) does not require an existing business relationship between the picketed neutral employer and the primary employer (J.A. 36). The Board's ruling is plainly correct.

Settled law acknowledges that the central legislative concern in enacting Section 8(b)(4)(B) was "the victim's neutrality" (J.A. 36). As the Board pointed out in its opinion in this case (*ibid.*), restricting the scope of Section 8(b)(4)(B) so as to protect only those neutrals who have an existing business relationship with the employer who is party to the labor dispute would fly in the face of stated legislative purpose. The Union's reliance upon their narrow inter-

pretation of the phrase "cease doing business" hardly justifies such a drastic dilution of the Act. That phrase has never been construed to require an existing business relationship between the primary and neutral employers.

Thus, prior to 1959, the Board had consistently held—with judicial approval—that the protection afforded by the secondary boycott provisions of the Act is not limited to the business dealings between the primary and secondary employer, but extends as well to the business dealings between the secondary employer *and others with whom the secondary does business. Retail Fruit & Vegetable Clerks* v. *N.L.R.B.*, 249 F. 2d 591, 595 (C.A. 9); *N.L.R.B.* v. *Washington-Oregon Shingle Weavers*, 211 F. 2d 149, 151–152 (C.A. 9); *IBEW* v. *N.L.R.B.*, 181 F. 2d 34, 37 (C.A. 2), aff'd, 341 U.S. 694; *N.L.R.B.* v. *International Brotherhood of Teamsters, Local 182*, 219 F. 2d 394, 395–396 (C.A. 2); *Local 450 Operating Engineers* v. *Elliott*, 256 F. 2d 630, 636–638 (C.A. 5).

The Court of Appeals for the District of Columbia thus stated its approval for the Board's broad reading of the "cease-doing-business" term:

> Although it is frequently true that the object of secondary picketing is to obstruct dealings with the primary employer, Congress did not so limit its language. And a moment's reflection establishes that such a limitation would not have been consonant with the central legislative purpose. That purpose was to confine labor conflicts to the employer in whose labor relations the conflict had arisen, and to wall off the pressures generated by that conflict from un-

> allied employers. If one of the latter could with impunity be forced to suspend its business relations with all persons other than the primary employer, the evil which Congress sought to get at would be complete. Many secondary employers would have no occasion to have commercial intercourse with the primary employers. Is it to be supposed that Congress intended that their business could be stopped by secondary pressures simply because of this circumstance? We think not . . . . *Miami Newspaper Pressman's Local No. 46* v. *N.L.R.B.*, 322 F. 2d 405, 410 (C.A. D.C.).

When Congress amended the secondary boycott law in 1959, therefore, it was fully aware of the Board's interpretation. Not only did Congress decline to compel a different interpretation, it took action which rested upon an approval of this broad reading of the Act. Thus, Section 8(e) was enacted in 1959 to close another loophole in the prior law: the execution of agreements between a union and a neutral employer whereby the latter agrees to boycott some other employer with whom the union is principally at odds. The language of Section 8(e), tracking the relevant terms of Section 8(b)(4)(B), refers to agreements to "cease doing business". As this court has already pointed out, Section 8(e) was intended to reach agreements which would operate only upon "future arrangements" as well as those contracts which require a termination of "existing arrangements". *N.L.R.B.* v. *Joint Council of Teamsters No. 38,* 338 F. 2d 23, 26–27 (C.A. 9). In other words, Congress in 1959 treated "cease" and "refrain" as synonymous in

drafting Section 8(e). An existing business relationship is not essential for proving a Section 8(e) violation. It would be anomalous to treat Section 8(b)(4)(B) differently. *National Woodwork Mfrs., supra,* 386 U.S. at 633–639.

In short, the Union's argument before the Board would—if adopted—not only undercut the settled interpretation of the Act, but it would require this step based solely upon the narrow reading of a term, which reading neither Congress, the Board nor the courts have ever previously approved.[6]

Furthermore, the Union's assertion that there was no existing business relationship between Reimann and the picketed neutrals can hardly go unchallenged. To be sure, at the time of the picketing, Reimann and the neutrals had already completed performance of their respective obligations under the construction contracts. But, as the Board pointed out, Northridge—the motel chain operator—and Candelaria—the owner and lessor of retail store buildings—both engage in businesses which expand through the construction of new facilities. And, as a general contractor in the building industry, operating in the same area where Northridge and Candelaria operate, Reimann is within the class of employers to whom

[6] Indeed, the "cease-doing-business" phrase has been read to provide protection for neutrals' business relations even in cases where no identifiable primary employer could be found, or where the union's real target was not an employer at all but, rather, some rival union. *National Maritime Union of America* v. *N.L.R.B.*, 342 F. 2d 538, 542–544 (C.A. 2); *National Maritime Union of America* v. *N.L.R.B.*, 346 F. 2d 411, 416–420 (C.A.D.C.); see *Washington-Oregon Shingle Weavers, supra,* 211 F. 2d at 152.

future construction contracts might be awarded (R. 36–37). In a sense, therefore, a business relationship between Reimann and the neutrals subsists even after the particular building contracts involved here were completed.

It fully comports with settled interpretation of the Act to prohibit the Union from picketing the neutrals to disrupt this surviving business relationship. Otherwise, it would be difficult to explain why the Act should protect neutral employers whose sole connection with the primary employer involves the occasional purchase of the latter's products. But there is no question about such an occasional purchaser's immunity from Section 8(b)(4) pressures, and the law has never considered stripping such a neutral of his protection during those periods of business inactivity between purchases.[7]

C. The contention that the Union's sole object was "informational" and therefore not within the reach of Section 8(b)(4)(B)

In addition to challenging the Board's interpretation of the term "cease doing business," the Union also raised an evidentiary defense. In the Union's view, the record would not warrant a finding that its picketing was for a forbidden object: only "publicity" of its labor dispute with Reimann was intended. Thus,

[7] See, e.g., *Amalgamated Meat Cutters* v. *N.L.R.B.* (*Swift & Co.*), 237 F. 2d 20 (C.A.D.C.), cert. denied, 352 U.S. 1015; *N.L.R.B.* v. *District Council of Painters No. 48*, 340 F. 2d 107 (C.A. 9); *N.L.R.B.* v. *Millmen & Cabinet Makers Union, Local 550, etc.*, 367 F. 2d 953 (C.A. 9); *N.L.R.B.* v. *United Brotherhood of Carpenters, etc.*, 184 F. 2d 60 (C.A. 10), cert. denied, 341 U.S. 947; *N.L.R.B.* v. *Enterprise Ass'n, etc.*, 285 F. 2d 642 (C.A. 2); and cf. *N.L.R.B.* v. *Joint Council of Teamsters No. 38*, 338 F. 2d 23 (C.A. 9).

the Union pointed out, the picket signs did not expressly request anyone to withhold their patronage of the picketed establishment, the Union actually had a labor dispute with Reimann and was entitled to publicize this dispute, and the picketing was confined to buildings actually constructed by Reimann.

The Board concluded, however, that the picketing was not designed solely to publicize the dispute with Reimann. Accordingly, even if that were one of its purposes, the existence of another, unlawful object suffices to warrant the finding of a violation. One unlawful object is enough.[8] And, on this record, we submit, there is ample evidentiary support for the Board's finding that the Union's picketing had a secondary object.

First, it is significant that the picketing in this case occurred at the premises of neutral employers, and at times when only neutrals were present at the sites. Moreover, neither of the picketed neutrals was offering consumers any goods or services produced by the primary employer, Reimann, at the time of the picketing. In these circumstances, of course, any union claim of an effort to confine its picketing so as to focus pressures solely upon the offending employer must have a hollow ring. Thus, even in the common situs cases—where primary and secondary employers share the same geographical location—union picketing has been viewed as secondary where it deliberately enmeshed

[8] *N.L.R.B.* v. *Denver Building Trades Council*, 341 U.S. 675 688–689; *N.L.R.B.* v. *United Ass'n of Journeymen, etc. Local 469*, 300 F. 2d 649, 651 (C.A. 9); *N.L.R.B.* v. *Milk Drivers & Dairy Employees Local Union No. 584, IBT*, 341 F. 2d 29, 32 (C.A. 2), cert. denied, 382 U.S. 816; *New York Mailers Union No. 6* v. *N.L.R.B.*, 316 F. 2d 371, 372 (C.A. D.C.)

the neutral employer to an extent greater than that required by the mere existence of a common situs. *United Steelworkers* v. *N.L.R.B.*, 294 F. 2d 256, 258–259 (C.A.D.C.) (secondary object inferred from placement of pickets at a location geographically remote from primary employees at the site); *Truck Drivers Local Union 728* v. *N.L.R.B.*, 249 F. 2d 512, 514 (C.A.D.C.) cert. denied, 355 U.S. 958 (secondary object inferred from prior conduct of union, seeking to cause a cessation of business, and from failure of pockets to advise neutral employees of any different object); *Retail Fruit & Vegetable Clerks, supra,* 249 F. 2d at 598 (secondary object inferred from union's decision to picket at a location on the common situs where it could maximize the picketing's pressure against the neutrals). See also, *Orange Belt District Council of Painters No. 48* v. *N.L.R.B.*, 361 F. 2d 70, 71 (C.A.D.C), enforcing 154 NLRB 997.

Moreover, Reimann—the primary employer—also had an office and its principal place of business in Salem, where the Union could have picketed without implicating neutral employers at all. The existence of such a separate primary situs is not necessarily a conclusive indicator of a secondary object, but the Board was surely entitled to give this fact some weight.[9] No other explanation for the Union's decision to picket at the neutral's premises was offered,[10] and the record

[9] *N.M.U.* v. *N.L.R.B.*, 367 F. 2d 171, 176 (C.A. 8), cert. den., 386 U.S. 959 and cased cited; *Brown Transport Corp* v. *N.L.R.B.* 334 F. 2d 30, 37 (C.A. 5); *Truck Drivers Local Union 728, supra.*

[10] To be sure, the "public" is present at this site, too. But it is a special aspect of the public with a unique capacity for causing economic injury to the neutral employers.

suggests no basis for supposing that Reimann's office would have been an ineffectual location to achieve the publicity effect assertedly sought by the Union.

Furthermore, the Union had previously taken action which resulted in a threat by the Oregon State Building & Construction Trades Council to take economic action against one of the neutrals if it did not remove Reimann from the Hyatt Lodge project. The picketing that followed need not be viewed in isolation. While the prior threat of action was never effectuated in the manner specified, the fact remains that the Union commenced its picketing at the neutral employers' premises against a background which plainly illustrated the Union's interest in seeing Reimann boycotted.

It is true, of course, that the language used on the picket signs did not refer to the neutral employers being picketed, nor did it explicitly request their consumers and suppliers to avoid dealing with them. But the language appearing on a picket sign is hardly conclusive. The Board is entitled to consider the location and timing of the picketings, and other surrounding circumstances, in evaluating the Union's real object. Where, as here, those circumstances fairly support a finding of secondary object, the courts have uniformly approved the Board's determination despite the language of the sign. *N.L.R.B.* v. *Millmen & Cabinet Makers Union, Local No. 550, etc.*, 367 F. 2d 953, 955–956 (C.A. 9); *N.L.R.B.* v. *Laundry, Linen Supply, etc., Drivers Local 928*, 262 F. 2d 617 (C.A. 9); Retail *Fruit & Veg. Clerks, supra*, 249 F. 2d at 599–600; *United Steelworkers* v. *N.L.R.B.*, 294 F. 2d 256, 258–259 (C.A.D.C.); *Brown Transport Corp.* v. *N.L.R.B.*,

334 F. 2d 30, 37–39 (C.A. 5); *N.L.R.B.* v. *Int'l Hod Carriers, Local 1140,* 285 F. 2d 397 (C.A. 8), cert. denied, 366 U.S. 903; *N.L.R.B.* v. *Highway Truckdrivers & Helpers Local 107,* 300 F. 2d 317, 321–322 (C.A. 3).

In this case, all potential customers of the picketed retailers would have been required to cross the Union's picket line in order to trade with the retailers. A picket line "is a potent instrument having a special message of its own". *Brown Transport, supra,* 334 F. 2d at 36. There is nothing in the record to suggest that the Union took any action here to cancel the invitation inherent in the picketing itself. As the Board put it, ". . . no steps [were] taken to insure against general economic injury to the building occupants" (R. 38). Indeed, as the Board pointed out, the implication to be drawn from the wording of the picket sign was that the picketed premises were themselves encompassed in the labor dispute.

The evidence summarized above amply justified the Board's determination that the picketing was not solely for an informational purpose: direct economic pressure against the picketed employers, as a tactical device to assist the Union in its dispute with Reimann, could also be inferred. *National Maritime Union* v. *N.L.R.B.,* 367 F. 2d 171, 175–176 (C.A. 8); *N.L.R.B.* v. *Local 254, Building Service Employees,* 359 F. 2d 289 (C.A. 1); cases cited *supra,* p. 16.

If the Board's determination of a secondary object is sustained, the Union's contention of a conflict with the guarantees of free speech in the United States Constitution must consequently be rejected. The Supreme Court long ago decided that there was

"no reason why Congress may not . . . proscribe picketing in furtherance of . . . unlawful objectives." *I.B.E.W.* v. *N.L.R.B.*, 341 U.S. 694, 705. And since it was stipulated that the Union engaged in picketing—as opposed to mere handbilling or other publicity devices—it is clear that the proviso to Section 8(b)(4) which immunizes "publicity, other than picketing, for the purpose of truthfully advising the public . . ." is inapplicable.

D. The contention that the Supreme Court's ruling in *N.L.R.B.* v. *Fruit & Vegetable Packers Local 760 (Tree Fruits)*, 377 U.S. 58, privileges the Union's picketing in this case.

As the foregoing discussion indicates, not all picketing at a neutral employer's premises is violative of Section 8(b)(4)(B). The location of the picketing, although indicative of a union purpose to bring forbidden pressures to bear against the neutral, is not always conclusive proof of such an object. Thus, for example, peaceful picketing at a retailer's store has been defended on the grounds that the sole object is to follow an "unfair" product to its outlet, i.e., to publicize the existence of a labor dispute with the manufacturer of the product and discourage retail consumption of that offending product without creating a separate strike or boycott against the neutral retailer. In *N.L.R.B.* v. *Fruit & Vegetable Packers Local 780 (Tree Fruits)*, 377 U.S. 58, the Supreme Court agreed that such a defense would have merit, but emphasized that the picketing must be "directed only at the struck product" (377 U.S. at 63) whereas "picketing which persuades the customers of a secondary employer to stop all trading with him was . . . barred" (377 U.S. at 71).

Application of the Supreme Court's consumer picketing theory to the facts of this case does not advance the Union's cause; on the contrary, *Tree Fruits* illustrates the propriety of the Board's decision.

The facts in *Tree Fruits* clarify the meaning of the exemption there granted. In that case, the union picketed at a Safeway supermarket in order to persuade customers of that market not to buy the Washington State apples on sale there. The union had no independent labor dispute with Safeway, but it was on strike against distributors of the named brand of apples. Safeway was advised that the picketing was only an appeal to his customers not to buy the "struck" apples, and that the pickets would refrain from any action inconsistent with such a limited objective. *Id.* at 60–61, 73–76. And, in fact, the picketing was so confined. For that reason, the Supreme Court stated, the picketing did not violate Section 8(b)(4)(B). *Id.* at 71.

> When consumer picketing is employed only to persuade customers not to buy the struck product, the union's appeal is closely confined to the primary dispute. The site of the appeal is expanded to include the premises of the secondary employer, but if the appeal succeeds, the secondary employers' purchases from the struck firms are decreased only because the public has diminished its purchases of the struck product. On the other hand, when consumer picketing is employed to persuade customers not to trade at all with the secondary employer, the latter stops buying the struck product, not because of a falling demand, but in response to pressure designed to inflict injury on his business generally.

> In such case, the union does more than merely follow the struck product; it creates a separate dispute with the secondary employer. (*Id.* at 72).

In the Board's view, the facts of this case present a situation where the picketing does not merely follow the primary dispute but, rather, is employed to persuade customers not to trade at all with the neutrals. As shown in the Statement, *supra*, pp. 3–4, the Union here picketed at the premises of neutral retailers who occupied buildings constructed by the primary employer. The pickets, stationed at consumer entrances, carried signs which announced that the building had been constructed "under sub-standard wages and conditions. . . ."

The Board concluded that

> Even assuming *arguendo* that identification of the building as the subject of the dispute created an appeal for a boycott of the so-called 'product' of the primary employer, such a product boycott would of necessity encompass the entire business of the neutral occupant's premises and therefore the entire business of the secondary employer, and must be said to be "employed to persuade customers not to trade at all with the secondary employers" and "designed to inflict injury on his business generally" (R. 39).

The Board's conclusion is sound and warrants affirmance here.

Every potential customer who approaches a retail establishment and discovers a union picket line is compelled to make a choice. The decision to cross or not to cross the picket line, in the usual situation,

will necessarily determine whether the customer will take sides with the picketed employer or with the picketing union. From the customer's point of view, the decision may be an unpleasant one, he may feel unprepared to decide or reluctant to take sides. But there is—in the typical case—no way to escape taking sides.

Tree Fruits, however, presented a special situation. There the union's conduct at Safeway's retail store premises made it clear to the approaching customer that he could support the union's cause and still patronize Safeway. The appeal of the picketing at Safeway plainly apprised consumers sympathetic to the union that they were being requested to act selectively, to focus their purchasing power in a way detrimental to the primary employer, and not to withhold their patronage entirely from Safeway.

The customers of Hyatt Lodge and Farrell's Ice Cream Parlor, in this case, have no such option. They, like the customers in the typical picketing situation, must necessarily refrain from all dealings with the picketed retailers if they decide to assist the picketing union.

It is true, of course, that the Board's decision contemplates that unions seeking to protest against building contractors will usually be unable to employ the technique of consumer picketing as employed by, for example, a union seeking to protest against an employer who produces merchandise to be sold in retail stores. But this does not demonstrate that the Board's decision is arbitrary. On the contrary, it simply reflects the fact that the Congressional prohibition

against secondary boycotts does not contain a precise catalogue of proscribed tactics. The central concern of the Act is "to confine labor disputes to the employer in whose labor relations the conflict had arisen" (*Miami Newspaper Pressmen, supra,* 322 F. 2d at 410) and to prohibit "pressure tactically directed toward a neutral employer in a labor dispute not his own" (*Woodwork Mfrs.,* 386 U.S. at 623). Hence, the same union tactics which amount to proscribed coercion of a neutral because of the surrounding circumstances in one case need not constitute such coercion in another case where the surrounding circumstances are different. The statute is "not an effort to insure that labor could have in all situations the same kind and extent of impact, that it could obtain in some cases . . ." *Grain Elevator, Flour & Feed Mill Workers, etc. Local 418* v. *N.L.R.B.,* 376 F. 2d 774, 779 (C.A.D.C.).

Likewise, the Board's decision to treat picketing at a common situs with less latitude than picketing at a location occupied solely by the primary employer has been authoritatively approved. *Local 761, IUE* v. *N.L.R.B.,* 366 U.S. 667, 679 and cases cited at 677. It is a fact that such a decision bears more heavily upon unions in the construction industry, where employers typically work at a common situs. But this fact has never been considered a valid defense, since the Board's treatment of common situs cases sensibly accommodates the relevant Congressional objectives. As the Court of Appeals for the District of Columbia Circuit has explained:

> We also realize the difficulty the building crafts have with the secondary boycott provisions of

> the Labor-Management Relations Act, but this court is not the forum in which to seek relief from what the union characterizes as 'the shackles' of this statute. *Local No. 5, United Ass'n, etc.* v. *N.L.R.B.*, 321 F. 2d 366, 370 (C.A. D.C.), cert. denied, 375 U.S. 921.

By the same token, we submit, the Board's instant decision should not be disturbed merely because it will bear more heavily upon some unions than others. Nothing in the Supreme Court's *Tree Fruits* decision suggests that such a result is improper. On the contrary, *Tree Fruits* contemplates that consumer picketing will be subject to the Act's prohibition whenever, as here, the picketing "is employed to persuade customers not to trade at all with the secondary employer." 377 U.S. at 72.

CONCLUSION

For the reasons stated, we respectfully submit that the Court should enter a decree enforcing the Board's order in full.

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AUGUST 1967.

CERTIFICATE

The undersigned certifies that he has examined the provisions of Rules 18 and 19 of this Court and in his opinion the tendered brief conforms to all requirements.

MARCEL MALLET-PREVOST,
Assistant General Counsel,
National Labor Relations Board.

APPENDIX

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C. Secs. 151, *et seq.*) are as follows:

Sec. 8(b) It shall be an unfair labor practice for a labor organization or its agents—

* * * *

(4)(i) to engage in, or to induce or encourage any individual employed by any person engaged in commerce or in an industry affecting commerce to engage in, a strike or a refusal in the course of his employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials, or commodities or to perform any services; or (ii) to threaten, coerce, or restrain any person engaged in commerce or in an industry affecting commerce, where in either case an object thereof is: * * *

(B) forcing or requiring any person to cease using, selling, handling, transporting, or otherwise dealing in the products of any other producer, processor, or manufacturer, or to cease doing business with any person, or forcing or requiring any other employer to recognize or bargain with a labor organization as the representative of his employees unless such labor organization has been certified as the representative of such employees under the provisions of section 9: * * *

Provided further, That for the purposes of this paragraph (4) only, nothing contained in such paragraph shall be construed to prohibit publicity, other than picketing, for the purpose of truthfully advising the public, including consumers and members of a labor organization, that a product or products are produced by an employer with whom the labor organization has

a primary dispute and are distributed by another employer, as long as such publicity does not have an effect of inducing any individual employed by any person other than the primary employer in the course of his employment to refuse to pick up, deliver, or transport any goods, or not to perform any services, at the establishment of the employer engaged in such distribution;

Sec. 8 (e) It shall be an unfair labor practice for any labor organization and any employer to enter into any contract or agreement, express or implied, whereby such employer ceases or refrains or agrees to cease or refrain from handling, using, selling, transporting or otherwise dealing in any of the products of any other employer, or to cease doing business with any other person, and any contract or agreement entered into heretofore or hereafter containing such an agreement shall be to such extent unenforceable and void: *Provided,* That nothing in this subsection (e) shall apply to an agreement between a labor organization and an employer in the construction industry relating to the contracting or subcontracting of work to be done at the site of the construction, alteration, painting, or repair of a building, structure, or other work: *Provided further,* That for the purposes of this subsection (e) and section 8 (b) (4) (B) the terms "any employer," "any person engaged in commerce or an industry affecting commerce," and "any person" when used in relation to the terms "any other producer, processor, or manufacturer," "any other employer," or "any other person" shall not include persons in the relation of a jobber, manufacturer, contractor, or subcontractor working on the goods or premises of the jobber or manufacturer or performing parts of an integrated process of production in the apparel and clothing industry: *Provided further,* That nothing in this Act shall prohibit the enforcement of any agreement which is within the foregoing exception.

U.S. GOVERNMENT PRINTING OFFICE: 1967

No. 21,888

In the

United States Court of Appeals

For the Ninth Circuit

NATIONAL LABOR RELATIONS BOARD,
Petitioner

and

CASCADE EMPLOYERS ASSOCIATION, INC.,
Intervenor

v.

SALEM BUILDING TRADES COUNCIL, AFL-CIO,
Respondent

ON PETITION FOR ENFORCEMENT OF AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD

RESPONDENT'S BRIEF

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JURISDICTION

This matter is before the Court on the petition of the National Labor Relations Board, pursuant to Section 10(e) of the National Labor Relations Act as amended 61 Stat. 136, 73 Stat. 519, 29 U.S.C. § 151 et. seq.) for enforcement of an order issued against the Salem Building Trades Council on February 20, 1967, found at 163 NLRB No. 9. The alleged unfair labor practices occurred in Salem, Oregon, in this judicial district.

STATEMENT OF THE CASE

I. THE BOARD'S FINDINGS OF FACT

The facts are undisputed and were stipulated to by both parties. The Salem Building Trades Council, AFL-CIO, has had a labor dispute with Reimann Construction Company, general contractor, since January of 1963, over the substandard wages and working conditions of laborers employed by that concern (R. 24). The wages and other benefits paid by Reimann are substantially below the prevailing rates in the area. For example, the differential between wage rates paid by Reimann for carpenters and those provided for under the union contracts in the Salem area ranges from 58 cents to $1.08 per hour. In addition, Reimann pays $2.00 per month for health and welfare coverage, while employers of carpenters working under union agreements pay 15 cents per hour to a jointly administered health and

welfare fund. Reimann maintains no pension plan, while employers under union contracts covering carpenters pay 15 cents per hour to a jointly administered pension trust. Reimann's hourly rate for laborers ranges from 85 cents to $1.60 per hour lower than the rate paid under union contracts in the area (R. 26-27).

Reimann was awarded a contract in early 1965 to construct a new motel, the Hyatt Lodge, near Salem, Oregon. Northridge Industries, Inc., owned this new motel (R. 24). Reimann, using nonunion carpenters and laborers, completed the new motel and left the premises on October 11, 1965 (R. 25). Prior to this time no picketing took place. Between November 8 and December 20, 1965, pickets from the Salem Building Trades Council patrolled outside the premises of the new Hyatt Lodge (R. 25).

In June of 1965, Reimann was engaged by Candelaria Investment Co., an Oregon corporation, to build a new shopping center in Salem, Oregon, to be called the Candelaria Shopping Center (R. 25). Here, too, Reimann completed the contract with nonunion carpenters and laborers. This project was completed on October 14, 1965, and Farrell's Ice Cream Parlor opened for business in the premises on November 9, 1965 (R. 25). Between November 9 and November 15, 1965, pickets from the Salem Building Trades Council sporadically patrolled near Farrell's premises (R. 26).

In both instances, the picketing took place only after Reimann had permanently vacated the premises. The picket placards contained the legend, "This building built under sub-standard wages and conditions by Reimann Construction Company Salem Building Trades Council" (R. 25). Pick-ups and deliveries did not diminish during the picketing, and the employees of both Hyatt and Farrell's continued working during this period (R. 27, 40).

As a result of the picketing, the Cascade Employers Association, Inc., a group both Hyatt Lodge and Reimann belonged to, filed the instant unfair labor practice charges and a complaint was issued by the General Counsel on December 17, 1965 (R. 9-13).

II. THE BOARD'S CONCLUSIONS AND ORDER

The parties entered into a stipulation of facts before the Board and waived proceedings before a Trial Examiner. On February 20, 1967, the Board issued its conclusions and order (163 NLRB No. 9). That portion of the complaint based on Section 8(b)(4)(i)(B) of the Act was dismissed on the grounds that there was no evidence that the Respondent's conduct was calculated to invite neutral employees to make common cause by engaging in work stoppages. The Board did find, however, that the Respondent's picketing violated Section 8(b)(4)(ii)(B) of the Act, concluding that the picket-

ing was engaged in to force Farrell's and Hyatt to cease doing business with Reimann. The Respondent's had made the following contentions before the Board:

(1) The lack of an existing business relationship between Reimann and Farrell's and Hyatt precluded a violation;

(2) The picketing was protected under the doctrine enunciated in the case of *N.L.R.B. v. Fruit & Vegetable Packers Local 760 (Tree Fruits)*, 377 US 58;

(3) Because the picketing was "informational," it was privileged by the U. S. Constitution.

(4) The picketing was privileged by the publicity proviso to Section 8(b)(4).

In its opinion, the Board ordered the Respondent to cease and desist from threatenting, coercing or restraining the named employers or any other persons in a manner prohibited by Section 8(b)(4)(ii)(B), and required the Respondent to post appropriate notices and provide signed copies of the notice to the employers for posting on their premises.

ARGUMENT

A. The Board erred in finding that the Respondent forced or required the secondary employers to "cease doing business" with Reimann because no business relationship

existed between those parties at the time this picketing transpired.

All parties agree, as is set out above, that at the time the picketing in question here took place no business relationship existed between the secondary employers and Reimann. The Board's decision correctly states that fact:

> "From the stipulation it is clear that at the time respondent picketed the motel and the ice cream parlor, Reimann had completed its construction contracts with Northridge and Candelaria and that no business relationship existed between Reimann and Farrell's. There is no indication that the motel, as such, or the ice cream parlor has ever engaged in business with Reimann in the past or intends to do business with Reimann in the future, nor was evidence presented to establish that Northridge or Candelaria had any specific future plans of like nature." (R. 35-36)

The Respondent's contention on this point is simply that the use of the present tense in Section 8(b)(4)(ii)(B), making it an unfair labor practice for a union to force or require any person "to cease doing business with another," restricts its application to those situations where a business relationship exists at the time of the union's conduct. In short, if no business relationship exists, there is *nothing to cease*, and that section cannot come into play.

Despite the facts and the clear wording of the statute, the Board's opinion went on to find a violation of Section 8(b)(4)(ii)(B) by concluding (1) that Congress, being concerned about neutrals, must have intended that the statute be interpreted to encompass the picketing which took place here, and (2) that Northridge and Candelaria might expand at some time in the future and want to use Reimann's services, and thus a business relationship did indeed exist. Neither of those conclusions should be allowed to stand.

Regarding the first point, the Board reached its broad result by stating that "Congress did not intend to confine Section 8(b)(4) to a strict and precise definition of terms which would limit its application in protecting neutral employers." (R. 36) The Board also stated that because the section was designed to protect neutrals, it was to be broadly construed and not confined to a "strict and precise definition of terms" (R. 36). This totally new approach to the interpretation of statutes restricting the right to strike and picket flies in the face of the existing case law. In the *Tree Fruits* opinion itself, the Supreme Court made it quite clear that such statutes are to be cautiously and strictly construed:

> "Throughout the history of federal regulation of labor relations, Congress has consistently refused to prohibit peaceful picketing except where it is used

as a means to achieve specific ends which experience has shown are undesirable. 'In the sensitive area of peaceful picketing Congress has dealt explicitly with isolated evils which experience has established flow from such picketing.' Labor Board v. Drivers Local Union, 362 US 274, 284. We have recognized this congressional practice and have not ascribed to Congress a purpose to outlaw peaceful picketing unless 'there is the clearest indication in the legislative history,' ibid., that Congress intended to do so as regards the particular ends of the picketing under review. Both the congressional policy and our adherence to this principle of interpretation reflect concern that a broad ban against peaceful picketing might collide with the guaranties of the First Amendment." (377 US at 62-63)

Two sections of the Act, as amended in 1947, must not be lost sight of. Section 7 guarantees labor the right to engage in concerted activities, including strikes and picketing, for the purpose of mutual aid or protection. 61 Stat. 140 (1947), 29 USC §157. Section 13 permits limitations on that right only as specifically provided for in the Act. 61 Stat. 151 (1947), 29 USC § 163. Although the section refers only to the "right to strike," it has been applied to other activity, including picketing, within the scope of Section 7. See *N.L.R.B. v. Drivers Union*, 362 US 274, 281, n.9. (1960); cf. *International Union, U.A.W. v. Wisconsin Employment Relation Board*, 336 US 245, 259-60 (1949). In *N.L.R.B. v. Drivers Union (Curtis)*, 362 US 274 (1960), which dealt with the right of a minority union to picket for recogni-

tion, the Supreme Court, through Justice Brennan, made it quite clear that Section 13 commands the courts to resolve doubts and ambiguities in this area in favor of union rights prior to the passage of the Taft-Hartley Act:

> "[S]ince the Board's order in this case against peaceful picketing would obviously 'impede' the right to strike, it can only be sustained if such power is 'specifically provided for' in Section 8(b)(1)(A), as added by the Taft-Hartley Act. To be sure, Section 13 does not require that the authority for the Board action be spelled out in so many words. Rather . . . Section 13 declares a rule of construction which cautions agains an expansive reading of that section which would adversely affect the right to strike, unless the congressional purpose to give it that meaning persuasively appears either from the structure or history of the statute. Therefore, Section 13 is a command of Congress to the courts to resolve doubts and ambiguities in favor of an interpretation of Section 8(b)(1)(A) which safeguards the right to strike as understood prior to the passage of the Taft-Hartley Act." (362 US at 282)

These cases show quite conclusively that the Board's view, to the effect that this statute must be construed as expansively as possible, is in error.

The 1959 amendments to the National Labor Relations Act were the result of one of the most prolonged, and careful, Congressional debates in the history of our Republic. Cox, "The Landrum-Griffin Amendments to the National Labor Relations Act," 44 Minn. L. Rev. 257

(1959). Despite all the study which resulted in the particular language chosen, the Board here is saying, in effect, that the Congress, by choosing to use the present tense in drafting the language "cease doing business with," really did not mean what it was saying, but also meant the past and future tense, because it could not possibly have wanted the picketing in question here to go unchallenged. To say the least, such an attitude is outrageous. First, it would have been a rather simple matter to draft the language in question so as to read as the Board would like to have it interpreted, and it can be presumed that if the Congress had so intended, it would have done so.

Secondly, it is presumed that the legislature, in phrasing a statute, knows the ordinary rules of grammar, and that the grammatical reading of a statute gives its correct sense. *United States v. Goldenberg*, 168 US 95 (1897); *Lake County v. Rollins*, 130 US 662 (1889).

Since 1959, in construing the particular language in question here, the courts have uniformly held that the statute requires an existing business relationship. In *N.L.R.B. v. Milk Wagon Drivers Union, Local 753*, 335 F2d 326, (7th Cir. 1964), the court referred, at page 328, to an "*existing business relationship.*" In *Hoffman v. Joint Council of Teamsters No. 38*, 230 F Supp 684, 688 (1962), the court, in construing Section 8(e) of the Act, referred to firms *presently doing busi-*

ness." (Italics ours) In *Local 3, International Brotherhood of Electrical Workers*, 140 NLRB 729, 730, the Board stated:

> "The objective of causing such a disruption of *an existing business relationship*, even though something less than a total cancellation of the business connection, is a 'cease doing business' object within the meaning of Section 8(b)(4)(B) of the Act." (Italics ours)

The result has been exactly the same where the courts have interpreted the language "doing business," which appears in many other statutes, such as the long-arm statutes. In the case of *Pergl v. U.S. Axel Co.*, 50 NE 2d 115, 117, the court stated "There must be continuous dealing." In *Frene v. Louisville Cement Co.*, 134 F2d 511, 515 (D.C. Cir. 1943), the court stated, that the fundamental principle underlying the "doing business" concept "is the maintenance . . . of a regular continuous course of business activities." In *Sullivan v. Sullivan Timber Co.*, 15 So 941, 943, the court stated that the phrase "does business" is equivalent in meaning to, and expressive of the same thought as, the words "doing business," and refers exclusively to the present time, not authorizing a suit against a corporation because it has in some time past transacted business in the county where the suit is brought, if it has ceased to do so at the time of bringing the action. In *Freese v. St.*

Paul Mercury Indemnity Co., 252 SW2d 653, 656, the court stated that the phrase "operation of a business" or "doing business" denotes a continuing enterprise, and an occasional, incidental, isolated or sporadic transaction would not bring one within the meaning of such an expression. In *Marchant v. National Reserve Co. of America*, 103 Utah 530, 137 P2d 331, the court stated that to be "doing business" within a state, a corporation must be engaged in a continuing course of business. In *Toothill v. Raymond Laboratories*, 100 F Supp 350, 352, 353 (D.C.E.D.N.Y. 1951), the court stated that to constitute "doing business" within the state a corporation's activities must be substantial, continuous, and regular, as distinguished from casual, single or isolated acts.

It should also be pointed out that despite the Congress's obvious concern in protecting a secondary "victim's neutrality," (to use the Board's unfortunate terminology), the National Labor Relations Act has often been interpreted in a way that indirectly results in harm to the neutral secondary employers.

In *N.L.R.B. v. Servette, Inc.*, 377 US 46 (1964) the court unanimously interpreted the term "produced" to encompass a situation where the neutral secondary employer merely "distributed," despite the fact that the result indirectly resulted in harm to that secondary employer, who was in fact a "neutral." In *Tree Fruits*,

itself, the court interpreted language in the same statute with the same result.

The utter illogic of the Board's simplistic analysis of the situation in question here (that because the secondary employers were neutrals, they *have* to be protected) is clearly pointed out by the following excerpt:

> "Almost every strike causes economic loss to one or more employers who are unconcerned with the labor dispute. A coal distributor may go bankrupt because of a coal strike. A small steel fabricator may be forced to close his doors because of a major steel strike. Such economic losses as these far outweigh the losses caused by secondary boycotts. Yet Congress has not sought to aid these neutrals * * * This point is significant—and sometimes overlooked—because it shows that, while harm to a neutral is an essential ingredient of a secondary boycott, such injury is not by itself objectionable in the eyes of the legislature." (Tower, "A Perspective on Secondary Boycotts," 2 Lab. L. J. 272, 273 (1951))

The Board's second point, that Respondent forced the secondary employers to "cease doing business" with Reimann because at some time in the future they might want to deal with him, also cannot withstand close scrutiny.

The Board stated in its opinion that there was no evidence that the motel or ice cream parlor had dealt with Reimann in the past, or intended to in the future, or that Northridge or Candelaria had any such future

plans. Then the Board went on, despite these facts, to hold that there was indeed some sort of a business relationship because "* * * Reimann remained within that class of employers to whom future contracts might be awarded." (R. 37) This conclusion is nothing but gross and unfounded speculation. There is not the slightest inference in the record that either concern had plans to expand in this "general area" or that Reimann would even be interested in bidding on such a project. By so concluding the Board assumed a fact, crucial we believe, which was not in evidence, which Respondent was not given the opportunity to rebut. Such an assumption is not only *per se* erroneous, but extremely unfair. Even the more liberal rule regarding judicial notice, that a matter will be noticed so long as it can be verified with a certainty,[1] could not have been met here.

It is clear here that the Board was interested only in supporting a previously arrived at conclusion through the use of this wild speculation. Otherwise, it would have taken into account the possibility that Reimann at some time in the future would discontinue its sub-standard wages and become unionized. In that case, of course, nothing would prevent that concern from being awarded such contracts *if indeed* they were to be offered, and if he happened to be the low bidder. Of course, there is nothing in the record about the future possibility of Reimann becoming unionized, but

1. McCormick on Evidence, Section 331.

this speculation would be no more unfounded than that in which the Board actually engaged.

The past decisions of the Board militate against the unsupported speculation engaged in here. In *International Association of Heat & Frost Insulators*, etc., 139 NLRB 688, 691, the Board stated:

> "* * * we cannot find that Industrial was using, handling, or otherwise dealing in products of Speed-line or that it ceased doing business with Speed-line, *as any such transactions were merely possibilities and highly speculative. Accordingly, we shall dismiss the charges relating to Speed-line Manufacturing Company.*" (Emphasis added)

B. The Board erred in refusing to hold that the principle enunciated in N.L.R.B. v. Fruit & Vegetable Packers and Warehousemen (Tree Fruits) 377 US 58 (1964) precluded the picketing in question from constituting a violation of §8(b)(4) of the Labor Management Relations Act.

In *N.L.R.B. v. Fruit and Vegetable Packers and Warehousemen* (Tree Fruits) 377 US 58 (1964), the Supreme Court held that the union involved did not violate Section 8 (b) (4) of the National Labor Relations Act by peacefully picketing, at secondary sites, against the products of a primary employer with whom the union had a dispute, stating flatly that

> "The consumer picketing carried on in this case is not attended by the abuses at which the statute was directed." (377 US at 64)

That decision clearly immunizes the picketing in question here from constituting a violation of Section 8(b)(4).

In *Tree Fruits*, as here, the union had a dispute with the producer and, as here, followed the products of that concern to secondary sites at the consumer level. In *Tree Fruits*, as here, there was no cessation of pick-up or deliveries at the secondary sites, and no refusal on the part of the secondary employees to cross the picket lines. The sole distinction between *Tree Fruits* and the situation in question here is that in the former case the union directed the consumers not to purchase the specific product it was picketing against, whereas, here, the Respondent did not direct the public to do, or to refrain from doing, *anything*, but merely publicized the fact that the buildings in question were built under substandard conditions.

In *Tree Fruits*, the union picketed 46 Safeway Stores in the Seattle area in order to substantially reduce the sale of one specific product, Washington state apples, which were being packed by nonunion firms. The Supreme Court, in holding such conduct not a Section 8 (b) (4) violation, made it quite clear that the result would have been to the contrary had the union directed the consuming public to withhold all patronage of the secondary employer:

> "When consumer picketing is employed only to persuade customers not to buy the struck product, the union's appeal is closely confined to the primary dispute. * * * On the other hand, when consumer picketing is employed to persuade customers not to trade at all with the secondary employer, the latter stops buying the struck product, not because of a falling demand, but in response to pressure designed to inflict injury on his business generally. In such case, the union does more than follow the struck product; it creates a separate dispute with the secondary employer." (377 US at 72)

Here, the Board has seized upon the above excerpt from the *Tree Fruits* decision, and stated that the picketing involved in this situation was "employed to persuade customers not to trade at all with the secondary employers" (R. 39). Such a conclusion is patently absurd. The picket placards used in this case displayed the following legend:

THIS
BUILDING
BUILT UNDER
SUB-STANDARD
WAGES AND CONDITIONS
BY
REIMANN CONSTRUCTION COMPANY
SALEM BUILDING TRADES COUNCIL

The placards did not, as can be plainly seen, ask, or even suggest, that the public "not trade at all" with

Farrell's Ice Cream Parlor or with Hyatt Lodge. They did not even go so far as the union in *Tree Fruits* and ask the public to refrain from purchasing a portion of the goods and services offered by those two concerns To the contrary, the above language clearly informed the public that the Respondent's dispute was with Reimann and that the only purpose of the picketing was to inform the public that the buildings were built under substandard conditions.

In addition, there is nothing in the record to indicate that the men carrying the placards informed the public *in any way* that they were not to patronize those two establishments. Moreover, the broad contention of the National Labor Relations Board that the public at large "must necessarily refrain from all dealings with the picketed retailers" is belied by the fact that *only one outlet* of both these concerns was picketed, and then only under the circumstances set out above. The Board flatly asserts that by picketing these two outlets the Salem Building Trades Council used a boycott "employed to persuade customers not to trade at all with the secondary employers." There is no basis in the record, let alone a substantial one, for such conclusion. Nowhere in the stipulated facts, which the Board accepted as the entire record in this case, is there evidence that even *one* potential customer chose not to patronize these two concerns because of the picketing. There is

no evidence that either concern was damaged in the slightest degree in this period. Surely, if either outlet had suffered a decline in business, it would have proffered its records to substantiate such a fact. This fact alone renders the Board's finding of an 8(b)(4) violation erroneous, as the *Tree Fruits* decision makes it clear that in order to find a threat, coercion or restraint, the concerns picketed must show economic loss. In that case, the Court of Appeals for the District of Columbia had held that Section 8(b)(4) was violated only if a substantial economic loss had accrued or was likely to occur (308 F2d 311). The Supreme Court, in reviewing the decision, went much further, saying that economic loss in itself would not constitute a *per se* violation of that section, but would in fact be nonviolative if attributed to consumer picketing of an unfair product:

> "We disagree therefore with the Court of Appeals that the test of 'to threaten, coerce or restrain' for the purposes of this case is whether Safeway suffered or was likely to suffer economic loss. The violation of 8(b)(4)(ii)(B) would not be established, merely because respondent's picketing was effective to reduce Safeway's sales of Washington state apples, even if this led or might lead Safeway to drop the item as a poor seller." (377 US at 72-73)

Given the fact that neither Northridge nor Candelaria has shown any economic loss, the conclusion is inescapable that *Tree Fruits* compels a reversal of the

Board's conclusion and a finding that the Salem Building Trades Council did not "threaten, coerce, or restrain" Hyatt or Candelaria.

The General Counsel's brief seems to imply that the *Tree Fruits* Doctrine should not be applied in Building Trades situations, evidently on the assumption that a building, or a portion thereof, cannot be "dropped" like one particular product line, and that as a result any picketing of a building must *ipso facto* result in a complete cessation of trade. Although such an argument might sound appealing in the abstract, it is clear that such was not the case here. As was pointed out above, there is absolutely no evidence that the picketing in question here resulted in any loss of trade. As a result, by refraining from asking the public not to patronize these two establishments, Respondent here did not confront them with the situation where they would have had to make the decision not to use the buildings. In short, we are not here presented with the question the General Counsel seems to allude to in his brief. It should be pointed out, however, that this Court has already put to rest the contention that *Tree Fruits* will not apply to the Building Industry. In the case of *NLRB v. Millmen and Cabinet Makers Union, Local No. 550*, 367 F2d 953, (9th Cir. 1963), the Union picketed at the construction site of a new housing addition, which was utilizing precut lumber prepared under substandard conditions. Al-

though this Court ordered enforcement of the Board's order,[2] the opinion made it quite clear that *Tree Fruits* could have been applied had the facts been different:

> "The principle enunciated in *Tree Fruits* permits a union to engage in picketing at the establishment of a secondary employer, so long as it is directed to his customers and not his employees, and not an attempt to 'restrain or coerce' the secondary employer to cease doing business with the primary employer." (367 F2d at 955)

The General Counsel nearly admits in his brief that if this Court were to hold that *Tree Fruits* cannot be applied in this situation, it would deprive Building Trades unions of the equal protection of the law as it presently stands. He then attempts to minimize the gross injustice of such a result through the use of *dicta* appearing in *Local No. 5, United Ass'n, etc., v. NLRB*, 321 F2d 366, 370 (D.C. Cir. 1963), cert. denied. 375 US 921. But the General Counsel fails to realize that the Court there simply meant that while the secondary boycott provisions of the L.M.R.A. apply equally to all unions, they are used to prohibit activities of building

---

2. There were several facts in that case not present here. A secondary employee refused to cross the picket line, and the secondary employer was doing business at that time with the primary concerns. In addition, the union attempted to apply direct force on the secondary employer to cease doing business with the primary concern, by stating to the secondary employer's counsel, "Well, it would be quite simple to get the fixtures removed and the pickets removed. All you have to do is stop buying from Steiner Lumber." (367 F2d at 954) The distinction is important—rather than applying indirect pressures through falling consumer demands, as in *Tree Fruits*, the union in that case made a direct oral threat to the secondary employer.

crafts *more often* than other unions, because of the particular nature of those unions' work. The result in that case would, of course, have been the same regardless of the type of union involved. The General Counsel has cited no authority for the proposition that *any* right of organized labor may not be availed of by the building crafts unions simply because of the nature of their work. Indeed, the Labor Management Relations Act is founded upon the proposition that all members of the laboring class are to be accorded equal and nondiscriminatory treatment.

If, as the General Counsel suggests, the *Tree Fruits* doctrine is to be modified so as not to apply to certain unions, that decision must come from the Congress and not from the Board or the Courts:

> "Although there are possible ways of finding a middle ground to control the extent of the right to product picket, it is doubtful that any significant curb on this right would be made by the Board or courts in view of the present state of the law and the difficulties that would attach to any limitation. Whether the Supreme Court's sanction of product picketing in Tree Fruits should stand will ultimately have to be faced by the Congress." Note, "Product Picketing—a new loophole in Section 8(b)(4) of the National Labor Relations Act," 63 Mich. L. Rev. 682, 696 (1965)

One final point should be made in regard to the *Tree Fruits* decision. That opinion makes it clear that

a necessary element of a violation of Section 8(b)(4) would be a finding that the union, through picketing, was seeking "the public's assistance in forcing the secondary employer to cooperate with the union in its primary dispute." (377 US at 64). Here such finding is impossible, because no business relationship existed between Reimann and the secondary employers picketed, and thus there was no way in which the secondary employers could in fact cooperate. This detail is dealt with at length *supra*.

C. The conduct in question here was protected by the publicity proviso to section 8(b)(4) of the Labor Management Relations Act.

The "publicity proviso" to Section 8(b)(4) provides that nothing contained in Section 8(b)(4),

> "* * * shall be construed to prohibit publicity, other than picketing, for the purpose of truthfully advising the public, including consumers and members of a labor organization, that a product or products produced by an employer with whom the labor organization has a primary dispute and are distributed by another employer, as long as such publicity does not have an effect of inducing any individual employed by any person other than the primary employer in the course of his employment to refuse to pick up, deliver, or transport any goods, or not perform any services, at the establishment of the employer engaged in such distribution."

The stipulation entered into before the Board makes it clear that the Respondent had a labor dispute with Reimann. (R. 24) It is also clear from the stipulation that Reimann "produced" the motel and the building where Farrell's Ice Cream Parlor is situated, within the meaning of the statute. (R. 24-25) No contention is made that the legend on the banners was not truthful. The Record also shows that no one employed at the motel or the ice cream parlor was caused to refuse to perform any services. (R. 39-40)

Although the stipulation refers to Respondent's conduct as "picketing," we submit that the proper description of Respondent's conduct must be considered in the light of all other facts contained in the stipulation. The Board has recognized that not all patrolling constitutes "picketing" within the meaning of the publicity proviso to Section 8(b)(4).

In the case of *Chicago Typographical Union*, 151 NLRB No. 152, 59 LRRM 1001, the Board quoted with approval from the decision of the Seventh Circuit Court of Appeals in *N.L.R.B. v. United Furniture Workers of America*, 337 F2d 936, 940, as follows:

> "* * * 'One of the necessary conditions of "picketing" is a confrontation in some form between union members and employees, customers, or suppliers who are trying to enter the employer's premises.' "

In the instant case, we submit that under the stipulated facts it cannot be said that there was a "confrontation between union members and employees, customers or suppliers who are trying to enter the employer's premises."

D. The patrolling in question here is constitutionally protected by the First Amendment's guarantee of free speech.

It is conceded in this case that no pick-ups or deliveries were halted, or even diminished, as a result of the patrolling which took place in this case. It is also conceded that no employees of either of the "secondary" concerns were induced not to work, and that all did in fact work throughout the period in question here. Further, the language on the placards themselves makes it clear that this was only informational patrolling, engaged in in order to let the public know of the dispute the union had with Reimann. This picketing, being for the sole purpose of disseminating information, is constitutionally protected by the free speech guaranties of the First Amendment. The General Counsel's brief, at page 14, concedes that picketing, in the absence of an unlawful secondary object, would be protected.

The General Counsel argues that the picketing coerced the secondary employers and that "direct economic pressure against the picketed employers, as a tac-

tical device to assist the union in its dispute with Reimann, could also be inferred." (Brief, p. 17). But, in the absence of any evidence of economic damage, loss of customers, or loss of employees, it is clear that the Board was in error in concluding that the picketing constituted "economic pressure" or "clear coercion." Section 8(b)(4) prohibits consumer picketing *only* if there is evidence *aliunde* that the picketing was coercive.

N.L.R.B. v. Fruit & Vegetable Packers, Local 760, (Tree Fruits) 377 US 58 (1964);

Wholesale Employers Local 261 v. N.L.R.B., 282 F2d 824, 826, 827 (D.C. Cir. 1960);

N.L.R.B. v. Brewery Workers Local 366, 272 F2d 817, 819 (10th Cir. 1959);

N.L.R.B. v. General Drivers Local 968, 225 F2d 205, 210, 211 (5th Cir. 1955), cert. denied 350 US 914.

There is no such evidence in this case. The Board, in its decision, attempts to impute sinister motives to the informational patrolling in this case by pointing to a letter written May 27, 1965, by the Oregon State Building & Construction Trades Council to Hyatt, threatening to put the motel on the "Official Unfair List and Do Not Patronize List." It must be pointed out that

there is nothing in the record which would indicate *any* agency, relationship, or direct or indirect connection, between the Salem Building Trades Council, the union involved in this case, and the Oregon State Building & Construction Trades Council. It was therefore error for the Board to rely on that letter as evidence of the "real" intent of the Salem Building Trades Council. Another point which should be made with respect to that letter is that the threat it contained, as the record indicates, was never in fact carrried out.

The General Counsel's brief, at pp. 15-16, makes much of the supposed fact that Reimann's principal place of business was not picketed and agrees that this factor was given weight by the Board in concluding that the Union obviously intended to harm the secondary employers. *Nowhere* in the stipulation, which constitutes the entire record in this case, is there any indication that Reimann's main office was not picketed. As a result, this alleged fact was erroneously relied upon. *Even if* Reimann's main office was not picketed, it should be pointed out that the Board's former rule, that secondary site picketing was lawful only if no adequate opportunity to picket the primary site were present, has been rather thoroughly discredited. See, e.g., *N.L.R.B. v. General Drivers Union*, 225 F2d 205, 210-211 (5th Cir. 1955). cert. denied 350 US 914; *Sales Drivers Union v. N.L.R.B. (Campbell Soup)*, 229 F2d 514 (D.C. Cir.

1955). Cert. denied 351 US 972; Lesnick, "The Gravamen of the Secondary Boycott," 62 Columbia L. Rev. 1363, 1378-1381 (1962).

Since there is no evidence of coercion in this case, the Board's conclusion, stripped of all rhetoric, is that the informational picketing in question here was *per se* coercive and therefore unlawful. Such a holding is clearly erroneous, as the restriction it places on informational patrolling is unconstitutional. U. S. Const., First Amendment; *Chauffers, Teamsters & Helpers Union v. Newell*, 356 US 341, Rev'g 181 Kan 898, 317 P2d 817.

Where the language of a statute will bear two equally obvious interpretations, the one which is clearly in accordance with the Constitution is to be preferred. *Knights Templars and M. Life Indem. Co. v. Jarman*, 187 US 197; *United States ex rel Attorney General v. Delaware & H. Co.*, 213 US 366, 408; *United States v. C.I.O.;* 335 US 106; *Carlson v. California*, 310 US 106. Section 8(b)(4) could as easily have been applied in this case in such a way as to allow the uncoercive informational patrolling we are here discussing.

The Board erred in concluding that the First Amendment does not protect the informational patrolling which the Respondent engaged in here.

CONCLUSION

For the reasons stated above, we respectfully submit that the Court should enter a decree setting aside and denying enforcement of the Board's order.

GREEN, RICHARDSON, GRISWOLD & MURPHY
DONALD S. RICHARDSON,
JOHN J. HAUGH

September, 1967.

CERTIFICATE

The undersigned certifies that he has examined the provisions of Rules 18, 19 and 39 of this Court and in his opinion the tendered brief conforms to all requirements.

DONALD S. RICHARDSON
Of Attorneys for Respondent.

APPENDIX

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C. Secs. 151, *et seq.*) are as follows:

Sec. 8(b) It shall be an unfair labor practice for a labor organization or its agents—

* * * * *

(4)(i) to engage in, or to induce or encourage any individual employed by any person engaged in commerce or in an industry affecting commerce to engage in, a strike or a refusal in the course of his employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials, or commodities or to perform any services; or (ii) to threaten, coerce, or restrain any person engaged in commerce or in an industry affecting commerce, where in either case an object thereof is: * * *

(B) forcing or requiring any person to cease using, selling, handling, transporting or otherwise dealing in the products of any other producer, processor, or manufacturer, or to cease doing business with any person, or forcing or requiring any other employer to recognize or bargain with a labor organization as the representative of his employees unless such labor organization has been certified as the representative of such employees under the provisions of section 9: * * *

Provided further, That for the purposes of this paragraph (4) only, nothing contained in such paragraph shall be construed to prohibit publicity, other than picketing, for the purpose of truthfully advising the public, including consumers and members of a labor organization, that a product or products are produced by an employer with whom the labor or-

ganization has a primary dispute and are distributed by another employer, as long as such publicity does not have an effect of inducing any individual employed by any person other than the primary employer in the course of his employment to refuse to pick up, deliver, or transport any goods, or not to perform any services, at the establishment of the employer engaged in such distribution;

Sec. 8 (e) It shall be an unfair labor practice for any labor organization and any employer to enter into any contract or agreement, express or implied, whereby such employer ceases or refrains or agrees to cease or refrain from handling, using, selling, transporting or otherwise dealing in any of the products of any other employer, or to cease doing business with any other person, and any contract or agreement entered into heretofore or hereafter containing such an agreement shall be to such extent unenforceable and void: *Provided*, That nothing in this subsection (e) shall apply to an agreement between a labor organization and an employer in the construction industry relating to the contracting or subcontracting of work to be done at the site of the construction, alteration, painting, or repair of a building structure, or other work: *Provided further*, That for the purposes of this subsection (e) and section 8(b)(4)(B) the terms "any employer," "any person engaged in commerce or an industry affecting commerce," and "any person" when used in relation to the terms "any other producer, processor, or manufacturer," "any other employer," or "any other person" shall not include persons in the relation of a jobber, manufacturer, contractor, or subcontractor working on the goods or premises of the jobber or manufacturer or performing parts of an integrated process of production in the apparel and clothing industry: *Provided further*, That nothing in this Act shall prohibit the enforcement of any agreement which is within the foregoing exception.

No. 21888

In the

United States Court of Appeals

For the Ninth Circuit

NATIONAL LABOR RELATIONS BOARD,
Petitioner,

vs.

SALEM BUILDING TRADES COUNCIL, AFL-CIO,
Respondent.

BRIEF OF INTERVENOR

On Petition for Enforcement of an Order of the National Labor Relations Board

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On Petition for Enforcement of an Order of
the National Labor Relations Board

BRIEF OF INTERVENOR

Introduction

This brief is submitted by Intervenor Cascade Employers Association, which was the charging party before the Board and represents its employer-members Reimann Construction Company (Reimann) and Northridge Industries (Hyatt).

Intervenor will comment on two issues:

1. Whether Respondent's picketing violated § 8(b)(4) of the Labor Management Relations Act in the absence of a present contract or business relationship between the picketed neutral employers and the primary employer; and

2. Whether Respondent's picketing was merely a

public appeal for a consumer boycott of the primary employer's products, and consequently was beyond the scope of § 8(b)(4) under *NLRB v. Fruit & Vegetable Packers (Tree Fruits)*, (1964) 377 US 58.

Applicable Statutory Provisions

Section 8 of LMRA provides:

> "(b) It shall be an unfair labor practice for a labor organization or its agents —
>
> * * * * *
>
> "(4) * * * (ii) to threaten, coerce, or restrain any person engaged in commerce or in an industry affecting commerce, where * * * an object thereof is
>
> * * * * *
>
> "(B) forcing or requiring any person to cease using, selling, handling, transporting, or otherwise dealing in the products of any other producer, processor, or manufacturer, or to cease doing business with any other person * * *: *Provided*, That nothing contained in this clause (B) shall be construed to make unlawful, where not otherwise unlawful, any primary strike or primary picketing; * * *"

Argument

I. Respondent's picketing violated § 8(b)(4) because its object was to disrupt further business dealings between Reimann and the picketed neutral employers and others; the absence of a present contract or business relationship between the picketed neutral employers and the

primary employer only emphasizes the prohibited secondary effect.

Respondent could have lawfully picketed the two job sites while construction was in progress. Instead, it waited until it was notified by Reimann that both jobs had been completed. At the time of the picketing, Reimann had no contract or other present business relationship with either Hyatt or Candelaria, and Respondent contends that in such case it cannot be found to have acted for the illegal object of "forcing or requiring any person * * * to cease doing business with any other person * * *." There are two errors in its approach: It considers too short a period of time and too few employers.

a. According to Respondent, the Board can consider only the time during which picketing occurred; if no business relationship *then* existed between the picketed neutrals and the primary employer, no unfair labor practice has been committed. Yet there concededly had been such a relationship in the past, and Respondent's view ignores the impact of present picketing on *future* business dealings between them. While there is no evidence of the specific plans of Hyatt and Candelaria to expand their operations, the stipulation does disclose — and the Board found — that both are engaged in businesses which grow through the con-

struction of new facilities. Hyatt, in fact, has grown until it now operates 38 motels in 14 states. The Board correctly found that:

> "* * * As a general contractor in the construction industry in the area where both Northridge and Candelaria operate, Reimann remained within that class of employers to whom future construction contracts might be awarded. Thus, it is apparent that at the very least an object of the picketing was forcing and requiring Northridge and Candelaria to refrain from utilizing Reimann's services for any future construction. * * *" (Decision and Order, p 6)

b. Secondly, Respondent's view considers only Hyatt and Candelaria as potential customers of Reimann. Whether or not either continues to grow, there are hundreds and thousands of other businesses in the market for construction work in Oregon. Respondent's picketing was not designed merely to strike at the primary employer through these two picketed businesses; more generally, it was intended to serve notice on every neutral business, whether it be a motel or restaurant chain, a housing developer or any other, that using Reimann as a construction contractor is unwise and dangerous because the neutral will be picketed by Respondent after the job is finished and commercial operations have begun in the new facility. Respondent intended, by its picketing, to advise all neutral employers of the

economic reprisals which would result if they should do business with Reimann.

Section 8(b)(4) is not limited to cases in which the coerced neutral employer is himself the one whose business relationship with the primary employer is disrupted. It is sufficient that pressure is put upon "any person" with an object of forcing or requiring "any person * * * to cease doing business with any other person * * *." The "person" referred to in § 8(b)(4)(ii) need not be the same "person" referred to in § 8(b)(4)-(ii)(B). It is a violation of the Act to coerce a neutral employer so that other neutral employers will refrain from doing business with the primary employer. *Intl. Longshoremen's Assn., Local 1224 (Jess Edwards, Inc.)*, (1966) 160 NLRB No. 65, 63 LRRM 1025.

In sum, the Board properly looked beyond the two months' period in which picketing occurred and the two employers who were picketed — it had to look (as Respondent itself undoubtedly did) to the future and to other neutral employers who were also the targets of Respondent's activities. As the Board concisely stated:

> "* * * To hold, as Respondent would have us do, that upon the completion of one contract the neutral employers, by virtue of their past business dealings, become fair game for picketing pressures by a union seeking, as here, to enforce its blacklist of the primary employer, would be to apply that Section in a manner inconsistent with both its terms and the basic

policy considerations underlying its enactment." (Decision and Order, p 6)

II. Respondent's picketing was not lawful under the rule of the *Tree Fruits* case.[1]

Respondent suggested before the Board that its picketing was merely an appeal to the public to boycott the "products" of the primary employer (i.e., the two buildings) by following those "products" to a secondary situs and asking the public not to use them.

In *Tree Fruits*, the union first struck packers and warehouses which were selling apples to the Safeway chain of retail food stores. The union then instituted a consumer boycott against the apples in support of their strike. It sent letters to the store managers explaining the purpose of the picketing and enclosed copies of written instructions issued to the pickets telling them not to interfere with deliveries or ask customers not to patronize the stores. Thereafter, 46 stores were picketed. The pickets' signs said:

> "To the Consumer: Non-union Washington State apples are being sold at this store. Please do not purchase such apples. Thank you. * * *"

1. *NLRB v. Fruit & Vegetable Packers (Tree Fruits)*, supra, (1964) 377 US 58.

The pickets distributed handbills stating:

"This is not a strike against any store or market."

The Supreme Court held that the picketing did not violate § 8(b)(4). It explained its decision as follows:

> "* * * When consumer picketing is employed only to persuade customers not to buy the struck product, the union's appeal is closely confined to the primary dispute. The site of the appeal is expanded to include the premises of the secondary employer, but if the appeal succeeds, the secondary employer's purchases from the struck firms are decreased only because the public has diminished its purchases of the struck product. On the other hand, when consumer picketing is employed to persuade customers not to trade at all with the secondary employer, the latter stops buying the struck product, not because of a falling demand, but in response to pressure designed to inflict injury on his business generally. In such case, the union does more than merely follow the struck product; it creates a separate dispute with the secondary employer." (377 US at 72)

Tree Fruits has no application to the present situation. In the first place, there is no similarity between the commodity which was the subject of the primary dispute in that case and the buildings from which the neutral employers conduct their businesses in this one. In *Tree Fruits*, the struck product was only one of hundreds of products sold by the neutral employer. In this case, Respondent's picketing restrained the market-

Conclusion

The Respondent has enmeshed "unoffending employers and others * * * in controversies not their own."[2] It has done so for the purpose of causing these neutral employers and others who are made aware of the situation to refrain from using the services of the primary employer.

For the foregoing reasons, the picketing violated § 8(b)(4), and the Board's order should be enforced.

Respectfully submitted,

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2. *N.L.R.B. v. Denver Bldg. & Const. T. Council*, (1951) 341 US 675 at 692.

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

DANIEL ANTHONY BURNS, also known as DANIEL ANTHONY JASEK,
Appellant,

vs.

UNITED STATES OF AMERICA,
Appellee.

No. 21890

On Appeal from the Judgment of
The United States District Court
For the District of Arizona

BRIEF FOR APPELLEE

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IN THE
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BRIEF FOR APPELLEE

I.

JURISDICTIONAL STATEMENT OF FACTS

On November 28, 1966, an Indictment was returned by the Federal Grand Jury sitting at Phoenix, Arizona (Transcript of the Record, Volume I, Item 1). (Hereinafter Volume I of the Transcript of Record will be referred to as "RC," Volume II of the Transcript of Record, i.e., the Reporter's Transcript, will be referred to as "RT", the number following will refer

to the page and the number following "L" will refer to the line. Appellant will be referred to as Burns.)

The Indictment charged Burns with having transported a stolen motor vehicle, that is, a 1965 four-door Cadillac DeVille automobile, Vehicle Identification Number B5253136, from Chicago, State of Illinois, to Tucson, State and District of Arizona, on or about October 25, 1966, and that he then knew the motor vehicle to have been stolen, all in violation of 18 U.S.C.A., § 2312 (RC Item 1).

On December 2, 1966, John E. Lindberg was appointed to represent Burns; Burns pleaded not guilty, and trial was set for January 31, 1967 (RC Item 15).

On January 12, 1967, Burns filed a Motion to Reveal Name of Informer (who informed the FBI of his whereabouts) (RC Item 2). (Burns was a fugitive from the Western District of New York, and claimed the FBI must have had an informer who told them of his whereabouts.) On January 18, 1967 the Government filed a Memorandum in Opposition (RC Item 3).

On January 23, 1967, the Court heard the Motion to Reveal Name of Informer and the Motion was denied (RC Item 15). On January 30, 1967, the Government moved for a continuance and it was granted to February 2, 1967 (RC Item 15). On February 2, 1967, the trial was reset for March 7, 1967, at the request of Burns (RT 5 L 8-12; RC Item 15). On March 7 and 8, 1967, trial was held; Judge William J. Lindberg, sitting (RC Item 15). On March 8, 1967, the jury returned a verdict of guilty (RC Item 6). On March 13, 1967, Burns filed a Motion for Judgment of Acquittal or for New Trial on the grounds the verdict was not supported by sufficient admissible evidence and was not supported by the evidence (RC Item 7). On March 16, 1967, the Government filed a

Memorandum in Opposition (RC Item 8). On March 17, 1967, the Court entered a judgment of guilty and sentenced Burns to five years under 18 U.S.C.A., § 4208(a)(2), said sentence to begin to run at expiration of the sentence imposed in the Western District of New York (RC Item 9). On March 22, 1967, Burns attempted to file a Notice of Appeal, but which was endorsed by the Clerk (RC Item 13). On April 7, 1967, Burns filed a Motion to Reduce Sentence and petitioned to appeal in forma pauperis (RC Items 10 and 11). On May 3, 1967, the Court entered an Order granting an Appeal in Forma Pauperis (RC Item 12).

This appeal is pursuant to the provisions of 28 U.S.C.A., § 1291.

II.

STATEMENT OF FACTS

Robert W. Bycraft, a resident of Chicago, Illinois, parked a 1965 Cadillac he had bought for his wife across the street from their apartment in Chicago, Illinois, at about 9:30 in the evening of August 17, 1966 (RT 18-19). He locked the ignition and the doors (RT 19 L 20-25). He went out the following day, August 18, 1966, at about 4:00 o'clock in the afternoon to move the car and found it missing (RT 20, L 1-11). He still has the two complete sets of keys (RT 20 L 12-15). He gave no one permission to take the car and did not recognize Burns (RT 20 L 16-20). The third page of Government's Exhibit 1 was identified by Mr. Bycraft as the Illinois Certificate of Title to his missing car. He verified the vehicle identification number, B5253136, in the exhibit as the vehicle identification number of his car (RT 22 L 2-6). On cross-examination he was asked if he looked at the serial

numbers of the Cadillac and he replied he had not committed them to memory. Mr. Bycraft identified the other documents in Government's Exhibit 1 in evidence (the first two pages were the authentication of the documents) after the Illinois Certificate of Title (RT 24 L 20-24). The next document was the application for an Illinois State license (RT 25 L 2-8). The next document was the application for a transfer of the Illinois State license plate of Bycraft on his old Cadillac to the 1965 Cadillac (RT 25 L 20-24). And the next document was the Certificate of Origin, which is a document that is needed in order to obtain a Certificate of Title in Illinois (RT 26 L 6-19).

Hugh Barrasso, a resident of Tucson, Arizona, testified he is a salesman for the Cadillac-Oldsmobile dealer in Tucson, and that the car agency also sells used cars (RT 29 L 4-17). Barrasso recognized Burns as Daniel Jasek from whom he personally purchased a 1965 Cadillac for $3500.00 in mid October, 1966, which Burns had brought to the dealer's lot (RT 29 L 23 to 33 L 13). Burns bought from the dealer a used 1963 Oldsmobile for $1895.00, plus tax and license (RT 32 L 16-25). Burns had a Virginia title to the 1965 Cadillac (RT 34 L 21-23). On cross-examination Barrasso testified there were three meetings with Burns prior to the actual purchase; first, at the car lot, then at Burns' apartment, and then at the lot again (RT 39-45). Barrasso had an employee drive the Cadillac downtown to have it checked by the State Motor Vehicle Department while Burns test drove the Oldsmobile (RT 48-50). Barrasso did not believe he informed Burns that he had had this done (RT 49 L 17-21). Burns' attorney brought out, over objection, that Barrasso saw Burns in the County Jail about a month after the purchase of the 1965 Cadillac and the Cadillac had been taken from him by legal process (RT 51-53). The salesman, Barrasso, did not

check the numbers of the Cadillac himself (RT 55 L 23 to 56 L 2). Barrasso testified the vehicle identification number appears on the door plate and the engine block, but did not know of a secret number (RT 56 L 3-14). Burns' attorney withdrew his objection to that part of Government's Exhibit 1, which was the assignment of the title to Travelers Insurance Company, since Burns' attorney had brought out from Barrasso that Travelers Insurance Company had obtained the Cadillac from Barrasso by legal process (RT 57-58).

Bill Metzger testified he is employed by the National Automobile Theft Bureau, which is a non-profit organization supported by insurance companies and which assists law enforcement agencies in the investigation of automobile thefts, salvage rings, and fraudulent fires; and they participate in the training of police officers in Phoenix and Tucson, and of the Arizona Highway Patrol officers (RT 59-60). By a salvage ring operation, Metzger explained, is meant the process by which wrecked vehicles are purchased and the identification or serial numbers are taken off of them and placed on stolen vehicles (RT 60 L 8-13). Bill Metzger also gave his training and experience in automobile identification, and the number of times he had qualified in court as such an expert (RT 60-61). Metzger testified as to his study of how Cadillacs, and particularly how 1965 Cadillacs, are marked with the vehicle identification numbers (RT 63). The 1965 Cadillac he examined at Paulin Motor Company in Barrasso's presence, and in the presence of FBI Agent Don Slattum, did not have an asterisk before and after the vehicle identification number stamped on the engine block, and was also not aligned and was not the same size as Metzger had learned (RT 64-65).

Metzger then identified Government's Exhibit 5, which he had "lifted" from the 1965 Cadillac Barrasso had in his

possession at the time he, Metzger, examined it in the presence of Barrasso and FBI Agent Slattum (RT 65-68). It is "lifted" by spreading graphite over the area and then placing Scotch tape over the area, peeling it off and placing it on a piece of paper (RT 66 L 13-16). The secret number on Government's Exhibit 5 is the same as the serial number of Mr. Bycraft's car, i.e., B5253136 (RT 87 L 24 to 88 L 1). Government's Exhibit 5 was admitted into evidence (RT 89 L 19).

On cross-examination of Metzger it was brought out he had never been to the Cadillac Motor Company's factory (RT 83 L 14-17).

The defense consisted of the testimony of three witnesses, Burns himself, Mary Cross and Nancy Mayland.

Burns testified he left Chicago in April or May of 1966 in a rented Chevrolet in the company of Nancy Mayland (RT 90-91). From Chicago they went to Hopkinsville, Kentucky, and from there to Nashville, Tennessee. From Nashville they went to Indianapolis (RT 91). At Indianapolis he met Paul Lawrence and Jerry Green. Burns gave the rented car to Green to return it to Chicago (RT 92).

Burns testified he left Chicago because he was arrested for the theft of a car in Chicago while he was in New York State being tried for the theft of several automobiles and for which he was convicted, and appealed (RT 93 L 14-25). He had been released on bond pending appeal and also had been released on bond on the Chicago charge at the time he left (RT 94).

Burns testified he had not returned to Chicago after he left in April or May (RT 96). He obtained the 1965 Cadillac in Louisville, Kentucky, around August 25, 1966, from Paul Lawrence (RT 96 L 21-25). The car was given to Burns in

part payment of money owed to Burns by Lawrence (RT 97 L 3-10). The car was registered in the name of Spires' son-in-law, Daniel Jasek (RT 97 L 11-20). (Spires was a man who had accompanied Lawrence.) Spires had told Burns his son-in-law had gone to Viet Nam and Spires was to dispose of the car (RT 97 L 23 to 98 L 3). Burns was shown a West Virginia title by Spires and he called the West Virginia Motor Vehicle Department to verify it was registered there (RT 98-100). Burns drove Spires to Clarksville, Tennessee (RT 100-101). Burns and Miss Mayland arrived in Tucson the end of August, stopping in El Paso (RT 101). Burns sold the car ultimately to Barrasso (RT 101-103). Burns knew the car would be taken in for a motor vehicle inspection (RT 104). Burns did not know the 1965 Cadillac was stolen (RT 105 L 11-13), and he didn't know because he wouldn't have taken it from Paul Lawrence since he had "just been convicted in New York City, having to do with automobiles that were stolen." (RT 105 L 18-20).

On cross-examination it was brought out Burns had twice been convicted of a felony (RT 106). Burns testified Lawrence owed him $5000.00 for tractor and trailer parts he had furnished Lawrence, but was not able to use this money for his appeal (RT 106-107).

He was asked if at the time of his arrest by three FBI agents he told the agents he had purchased the Cadillac from a man whose name he did not know for $4100.00. This he denied (RT 115).

Mary Cross, the Superintendent of Titles for the Motor Vehicle Division of the Arizona Highway Department, identified records from her office, Defendant's Exhibit C, as an application for an Arizona Certificate of Title based on a West Virginia Certificate of Title (RT 117-119). Title was never

issued at the request of Mr. Metzger of the National Auto Theft Bureau (RT 119). Miss Cross wrote to West Virginia to verify their title and received a copy of a bill of sale which was not certified. Over Government's objection as to foundation, the West Virginia records were admitted by the Court (RT 119-124). On cross-examination, Miss Cross testified she did not know the requirements in West Virginia for the issuance of titles to out-of-state vehicles (RT 126).

Nancy Mayland testified she and Burns left Chicago in a rented Ford (RT 128 L 7). They left Chicago in early April and arrived in Tucson the first week in September in a 1965 Cadillac (RT 128). The Cadillac was acquired in Kentucky or Tennessee from Paul Lawrence as part payment of a debt (RT 128-129). She stated he called West Virginia from a motel room to verify the title (RT 130). (Burns had said he made the call from a public phone and not the motel room, RT 109 L 11-14.) She testified to the conversation between Burns and Lawrence in August concerning the car (RT 136), and taking a friend of Lawrence's home (RT 137).

The Government offered the testimony of Raymond P. Peters, Jr., a Special Agent of the Federal Bureau of Investigation, who testified that Burns, on being arrested as a fugitive, stated he had obtained the Cadillac in June or July for $4100.00 from a man he did not recall (RT 145 L 10-17).

III.

OPPOSITION TO SPECIFICATION OF ERRORS

1. The Court did not err in permitting testimony relative to the method of application and appearance of Cadillac identification numbers.

2. The Court did not err in denying Appellant's Motion for Acquittal and for a New Trial.

3. The verdict of the jury was supported by substantial, admissible evidence.

IV.

ARGUMENT

The verdict was supported by substantial, admissible evidence.

Appellant concedes that on appeal the evidence is construed in the light most favorable to the Government. *Glasser v. United States,* (1942), 315 U.S. 60, 62 S.Ct. 457, 86 L.Ed. 680; *Schino v. United States,* (9th Cir., 1953), 209 F.2d 67 at p. 72.

Appellant contends it was error to admit the testimony of Metzger, the National Auto Theft Bureau Agent, as to how 1965 Cadillacs are marked. Metzger stated at page 63, lines 1 to 15, as follows:

> "Q (By Miss Diamos) Are you acquainted or have you received any training or specialized information as to how the Cadillac Division of General Motors Corporation identifies or puts the vehicle identification number on its cars?
>
> "A Yes, ma'am. I have checked it with the Coulter Cadillac in Phoenix, how the numbers are stamped, every year. I check those out to see how they are stamped.
>
> "Q You physically do this?
>
> "A Yes, ma'am.
>
> "Q It's information you gain with your own eyes, or is it information that is given to you by the dealer?

"A No, I observe these personally.

"Q And did you observe them in the 1965 model of Cadillacs?

"A Yes, ma'am."

This was not knowledge based on observation of one car. It is respectfully submitted the evidence was properly admitted. Admission of expert testimony lies in the sound discretion of the Court and the Judge's discretion is reviewable only for abuse. *McCormick on Evidence,* § 13, page 29, (please see pages 59 through 61 of the Reporter's Transcript for his, Metzger's, qualifications).

The secret number that was found on the 1965 Cadillac was the same as that on the Bycraft Cadillac stolen in Chicago. It is respectfully submitted it was the stolen Bycraft Cadillac as the jury found.

Burns was impeached by his two felony convictions and by his denial of the statement made to the FBI Agents as to how he acquired the car. As was stated by this Circuit in *Schino v. United States,* supra, at page 72:

> "[10-12] Appellants each assert that, as to himself, the evidence is insufficient to support the verdict. In determining this question, we must consider the evidence in the light most favorable to the government. Glasser v. United States, 315 U.S. 60, 68, 62 S.Ct. 457, 86 L.Ed. 680; Woodard Laboratories v. United States, 9 Cir., 198 F.2d 995. Viewed in this light, the state of the evidence is such that a juror's reasonable mind '*could* find that the evidence excludes every reasonable hypothesis but that of guilt'. In such a situation, the case must be submitted to the jury, and their decision is final. Remmer v. United States, 9 Cir., 205 F.2d 277, 287-288, and cases cited. The theory upon which appellants rely, that in a circumstantial evidence case a conviction cannot be supported if the evidence is as consistent with innocence as

with guilt, has been laid to rest in this circuit by the Remmer case, at least where, as here, the question arises on a motion for a judgment of acquittal."

False exculpatory statements are evidence of guilty knowledge. *Young v. United States,* (9th Cir., 1966), 358 F.2d 429, at p. 431.

V.

CONCLUSION

It is respectfully submitted that the verdict was supported by substantial, admissible evidence.

Respectfully submitted,

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Attorneys for Appellee

I certify that, in connection with the preparation of this Brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that in my opinion, the foregoing Brief is in full compliance with those rules.

JO ANN D. DIAMOS
Assistant United States Attorney

Three copies of the within Brief of Appellee mailed this 6th day of September, 1967, to:

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IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

ROBERTO VARGAS GARCIA, Appellant, v. PEOPLE OF THE STATE OF CALIFORNIA, et al., Appellees.	)	No. 21893

APPELLEE'S BRIEF

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APPELLEE'S BRIEF

JURISDICTION

The jurisdiction of the United States District Court to entertain appellant's petition for writ of habeas corpus was invoked under Title 28, United States Code section 1915. The jurisdiction of this Court is conferred by Title 28, United States Code section 2253, which makes an order in a habeas corpus proceeding reviewable in the Court of Appeals when, as here, a certificate of probable cause has been issued.

STATEMENT OF THE CASE

Appellant appeals from the order of the United States District Court for the Northern District of California, denying his petition for writ of habeas corpus.

A. Proceedings in the state courts.

On December 11, 1958, appellant was convicted of violating California Health and Safety Code section 11500 (possession of a narcotic). He was sentenced to be imprisoned for the term prescribed by law. There was no appeal. A copy of this judgment and commitment is marked "Exhibit A," attached hereto and made a part hereof.

Thereafter, on January 30, 1963, appellant was again convicted of violating California Health and Safety Code section 11500. Two alleged prior convictions for the same offense were found to be true. Appellant was sentenced to be imprisoned for the term prescribed by law. A copy of this judgment and commitment is marked "Exhibit B," attached hereto and made a part hereof. This conviction was affirmed on appeal by the Court of Appeal, Second Appellate District. The California Supreme Court denied appellant's petition for a hearing. See People v. Garcia, 227 Cal.App.2d 345, 353, 38 Cal. Rptr. 670, 674 (1964). Subsequently, the California Supreme Court denied without opinion appellant's petition for writ of habeas corpus (TR 43; AOB 3).[1/]

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1. "TR" refers to the transcript of record on the proceedings in the District Court.

B. Proceedings in the federal courts.

On December 14, 1964, the Supreme Court of the United States denied appellant's petition for writ of certiorari. Garcia v. California, 379 U.S. 949, 85 S.Ct. 446, 13 L.Ed.2d 546 (1964).

On August 6, 1965, the United States District Court for the Northern District of California denied appellant's petition for writ of habeas corpus for failure to exhaust state remedies (TR 5-6).

After having unsuccessfully applied for relief in the California Supreme Court, appellant again petitioned for habeas corpus in the United States District Court for the Northern District of California on December 30, 1965 (TR 2-10).

On February 14, 1966, the District Court issued an order to show cause (TR 7, 220; AOB 3). The petition was denied on July 6, 1966 (TR 78-79; AOB 3). On August 26, 1966, the Court granted a rehearing and directed respondent to make a supplemental return (TR 87; AOB 3-4). On November 26, 1966, the Court issued an order vacating the previous denial of the writ and a supplemental order to show cause (TR 97; AOB 4). On March 14, 1967, the Honorable Alfonso J. Zirpoli denied the petition, concluding that appellant was barred by McNally v. Hill, 293 U.S. 131, 55 S.Ct. 24, 79 L.Ed. 238 (1934), and did not come within the exception to the McNally

doctrine established in Ex parte Hull, 312 U.S. 546, 61 S.Ct. 640, 85 L.Ed. 1034 (1941) (TR 203-206; AOB 4).

On April 27, 1967, appellant filed notice of appeal (TR 218; AOB 4). On that date Judge Zirpoli granted appellant's Application for a Certificate of Probable Cause and application for leave to proceed in forma pauperis (TR 207-213; AOB 4). In accordance with petitioner's request, the Certificate of Probable Cause was expressly limited to the question of whether the McNally doctrine properly applies to appellant's case (TR 209, 216).

SUMMARY OF APPELLEE'S ARGUMENT

The District Court properly denied appellant's petition, correctly concluding that appellant comes within the bar of McNally v. Hill.

ARGUMENT

SINCE APPELLANT IS IN CUSTODY PURSUANT TO A CONVICTION WHICH HE HAS NOT CHALLENGED, THE DISTRICT COURT WAS WITHOUT JURISDICTION TO ENTERTAIN HIS PETITION ATTACKING A SUBSEQUENT CONVICTION.

On December 11, 1958, appellant suffered his second conviction for violating California Health and Safety Code section 11500, possession of narcotics. Exhibit A. Appellant was paroled from prison in May, 1962 (TR 109). The following October, the Adult Authority found that appellant had violated numerous

conditions of his parole (TR 204). The Adult Authority cancelled the parole and refixed appellant's term at the maximum (TR 109).

Prior to his return to prison, appellant was arrested for possession of heroin (TR 204). On January 30, 1963, this charge culminated in appellant's third conviction for violating Health and Safety Code section 11500. Exhibit B. On June 17, 1963, the Adult Authority made this conviction a supplementary ground for parole revocation (TR 205-06).

Appellant challenges only his 1963 conviction. He does not attack the 1958 judgment, under which he remains in custody. The District Court held, therefore, that appellant was foreclosed by the doctrine of McNally v. Hill, 293 U.S. 131, 55 S.Ct. 24, 79 L.Ed. 238 (1934). The District Court found that appellant's parole was not revoked solely (or primarily) because of the 1963 conviction. Thus, appellant was unable to bring himself within the narrow exception to McNally announced in Ex parte Hull, 312 U.S. 546, 61 S.Ct. 640, 85 L.Ed. 1034 (1941). Wilson v. Gray, 345 F.2d 282 (9th Cir. 1965). (TR 203-06).

Appellant does not now quarrel with the conclusion that Ex parte Hull does not apply to his case (TR 209-13; Appellant's Opening Brief). Rather, he asks this Court to discard a rule announced by the Supreme

Court of the United States in McNally v. Hill; the writ of habeas corpus will lie only to secure immediate release from custody.

The precise question presented is this: May the writ issue to challenge an allegedly invalid conviction because that conviction affects the petitioner's eligibility for parole under another judgment not attacked? Legal authorities and relevant policies compel a negative answer.

McNally forbids such an expansion of the scope of the writ. There the Supreme Court refused to permit a federal prisoner to attack a sentence which he had not yet begun to serve although he claimed that vacation of the future sentence would render him eligible for parole under another current and valid judgment.

The Supreme Court adhered to this position in Holiday v. Johnston, 313 U.S. 342, 61 S.Ct. 1015, 85 L.Ed. 1392 (1941), holding that habeas corpus would not be awarded to afford a federal prisoner an opportunity to apply for parole.

In 1948, Congress enacted 28 U.S.C. §2255, which authorized federal prisoners to petition for release or resentencing. The "sole purpose" of this statute was "to minimize the difficulties encountered in habeas corpus hearings by affording the same rights in another and more convenient forum." Hayman v. United States,

342 U.S. 205, 219, 72 S.Ct. 263, 96 L.Ed. 232 (1952). (Emphasis supplied.) To proceed under section 2255, a prisoner must be "in custody." Crow v. United States, 186 F.2d 704 (9th Cir. 1950). See Parker v. Ellis, 362 U.S. 574, 80 S.Ct. 909, 4 L.Ed.2d 963 (1960). The "custody" requirement established in 28 U.S.C. §2255 is identical with that in 28 U.S.C. §2241. Allen v. United States, 349 F.2d 362 (1st Cir. 1965); United States v. Bradford, 194 F.2d 197 (2d Cir.), cert. denied, 343 U.S. 979, 72 S.Ct. 1079, 96 L.Ed. 1371 (1952).

In Heflin v. United States, 358 U.S. 415, 79 S.Ct. 451, 3 L.Ed.2d 407 (1959), the Court held that a federal prisoner may not, under section 2255, attack a sentence which he is not serving. A majority of the Court specifically reaffirmed McNally. Id. at 421, 79 S.Ct. at 454, 3 L.Ed.2d at 411. (Concurring opinion of Mr. Justice Stewart).

We recognize that in these cases federal prisoners denied relief had alternate routes to the federal courts. See Arketa v. Wilson, 373 F.2d 582, 584 (9th Cir. 1967). It is equally clear, however, that the Supreme Court did not rest its decisions upon this basis.

Another reason militates against such a distinction. By its recent enactment of 28 U.S.C. §2254(d), Congress has evinced a new attitude of deference toward

state courts. Our national legislature has said, in effect, that state courts are satisfactory forums for vindicating federal constitutional rights. Thus, that federal prisoners denied habeas corpus or relief under section 2255 may have another remedy within the federal system is insignificant. There is no reason to treat differently federal and state prisoners.

It has been authoritatively determined that the "in custody" requirements of 28 U.S.C. sections 2241 and 2255 are identical. To distinguish the above-cited decisions from the instant case because a state prisoner has no other access to a federal forum would require a repudiation of the reasoning of those cases.

We have shown that, as recently as 1959, the high court reaffirmed the McNally doctrine. Appellant contends, nevertheless, that McNally has been drained of its vitality by subsequent decisions in Jones v. Cunningham, 371 U.S. 236, 83 S.Ct. 373, 9 L.Ed.2d 285 (1962), and in Fay v. Noia, 372 U.S. 391, 83 S.Ct. 822, 9 L.Ed.2d 837 (1963). We earnestly disagree.

Appellant takes as his text the brief but remarkable opinion of the Fourth Circuit in Martin v. Commonwealth, 349 F.2d 781 (4th Cir. 1965). Martin held that the "in custody" requirement of 28 U.S.C. §2241 was satisfied by an allegation that the petitioner's present right to be considered for parole was barred by

a conviction sought to be vacated, even though the petitioner had not yet begun to serve the sentence imposed upon the challenged conviction.

The Fourth Circuit acknowledged that its decision ignored the rule established by McNally. However, in light of Jones v. Cunningham, and Fay v. Noia, the court concluded that

> "There is reasonable ground for thinking that were the Supreme Court faced with the issue today, it might well reconsider McNally and hold that a denial of eligibility for parole is a 'restraint of liberty' . . . ." 349 F.2d 781, at 784.

Martin completely overlooks the Supreme Court's decisions in Holiday v. Johnston, supra, Hayman v. United States, supra, and Heflin v. United States, supra, and fails to analyze the holdings of Jones and Fay.

Jones held only that the restrictive conditions incident to a petitioner's parole status satisfied the "in custody" requirement of section 2241, so as to confer habeas corpus jurisdiction upon a District Court. This holding does not contravene the McNally doctrine.

Fay, far from suggesting the demise of McNally, reaffirms it. There the court stated that "custody in the sense of restraint of liberty is a prerequisite to habeas, for the only remedy that can be granted on

habeas is some form of discharge from custody. McNally v. Hill . . . ." Fay v. Noia, 372 U.S. 391, 427 n. 38. We find nothing in Fay to suggest that denial of eligibility for parole constitutes a restraint of liberty.

Jones and Fay are distinguishable from McNally, Martin, and this case, on the basis of prematurity, or mootness. Jones and Fay were single sentence cases in which habeas corpus could result in the petitioners' immediate release from custody. In the McNally-Martin situation, where the sentence attacked is to be served in the future, there is no prospect of immediate release. Nor is immediate release possible in appellant's case. If appellant prevails he will not be entitled to freedom, or even to parole as a matter of right; he will only become eligible for parole. Thus, as in McNally and Martin, appellant's attack is premature. The writ will not lie when the case has been mooted. Parker v. Ellis, 362 U.S. 574 (1960). In our view, prematurity and mootness are two sides of the same coin.

Moreover, it is doubtful that release on parole is within the scope of relief authorized by the writ, since Jones held that a prisoner on parole remains in custody. United States ex rel. Chilcote v. Maroney, 246 F.Supp. 607 (W. D. Pa. 1965). The writ lies to restore men to freedom, not to alter the circumstances of their custody.

Understandably, other courts have been more reluctant to overrule the Supreme Court that has the Fourth Circuit. The McNally doctrine stands in other circuits. See e.g., Palumbo v. State of New Jersey, 334 F.2d 524 (3d Cir. 1964); Osborne v. Taylor, 328 F.2d 131 (10th Cir. 1964); Carpenter v. Crouse, 358 F.2d 701 (10th Cir. 1966); King v. California, 356 F.2d 950 (9th Cir. 1966); but contra, Cuevas v. Wilson, 274 F.Supp. 65 (N. D. Cal. 1966); and cf. Allen v. United States, 349 F.2d 362 (1st Cir. 1965). Accord: United States ex rel. Brown v. Warden, 231 F.Supp. 179 (S. D. N.Y. 1964); United States ex rel. Chilcote v. Maroney, supra.

Perhaps these courts have been mindful of the necessary broad implications of Martin. The Fourth Circuit, however, appears willing to extend Martin to the limit of its logic: habeas corpus is available to attack any conviction. Williams v. Peyton, 372 F.2d 216 (4th Cir. 1967) held that the writ is available to one already eligible for parole on a sentence which he does not question, but whose chances for parole are manifestly restricted by the fact of other convictions and unserved sentences thereon, alleged invalid.[2/] In Tucker v.

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2. It seems doubtful that parole boards will be moved to parole an inmate, like appellant, who might show that one of his convictions, although founded upon guilt, was constitutionally infirm.

Peyton, 357 F.2d 115 (4th Cir. 1966), the court raised but left unanswered the question of whether a state prisoner is entitled to habeas corpus "though nominally held under an invalid sentence if there is a valid sentence to be served consecutively, until he has remained in custody long enough to meet the service requirements of the valid sentence." Id. at 117-18. We may expect the Fourth Circuit to provide the answer at an early date.

Given the inexorable logic of Martin, the Fourth Circuit must finally conclude that a state prisoner is entitled to attack any conviction. Having thus repealed the "in custody" requirement of 28 U.S.C. §2241, the court will then be forced to excise the identical language from 28 U.S.C. §2255, discarding several additional decisions by the United States Supreme Court in the process.

Appellant suggests that in Arketa v. Wilson, 373 F.2d 582 (9th Cir. 1967), this court accepted the rationale and holding Martin. He is mistaken.

Arketa suffered a criminal conviction in 1964. Prior convictions in 1957 and in 1961 left him ineligible for probation. Arketa was allowed to attack his 1961 conviction, under which he was serving a concurrent sentence, because if it were voided, he would become eligible for probation on the 1963 offense.

Probation, particularly in the absence of restrictive conditions, is tantamount to freedom. But for the alleged invalid conviction, Arketa might have been permitted to remain at liberty in 1964. Thus, Arketa holds only that the writ is available where the effect of the conviction attacked is to deprive the prisoner of the immediate possibility of freedom.

Appellant, like Martin, sought the writ not to gain the immediate possibility of freedom, but the future possibility of parole. Jones has established that parole is custody, not freedom.

Arketa permitted the use of the writ by a prisoner seeking probation. In language unnecessary to that decision, this court repeated an earlier dictum[3/] suggesting that the restrictions incident to probation matched those incident to parole, and hence, both probation and parole constituted "custody." If this assumption were fact, there would appear as much reason to allow a prisoner to change his status from prisoner to parolee as from prisoner to probationer.

We submit, however, that parole and probation greatly differ both in concept and in practice. Parole is

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3. Benson v. California, 328 F.2d 159 (9th Cir. 1964)

but an extension of the prison walls. The parolee remains a constructive prisoner. He does not enjoy in full measure the right of privacy protected by the Fourth Amendment. His parole officer may search his home without a warrant. See Hoptowit v. United States, 274 F.2d 936 (9th Cir. 1960). In California, a parolee has only those limited civil rights restored to him by the Adult Authority. Penal Code §3054. Examples of the restrictive social and economic conditions characterizing parole are found in Jones v. Cunningham.

Probation imposes fewer special restrictions upon personal liberty. A probationer does not necessarily forfeit his civil rights. His home is not subject to warrantless searches. In California, a successful probationer may retroactively withdraw his guilty plea or have an adverse verdict set aside in order to permit the court to dismiss the indictment or information lodged against him. Pen. Code §1203.4. This provision reflects the fundamental difference in the philosophies underlying probation and parole.

Sitting en banc, this court in Strand v. Schmittroth, 251 F.2d 590 (9th Cir.), cert. denied, 355 U.S. 886, 78 S.Ct. 258, 2 L.Ed.2d 186 (1957), carefully distinguished probation from physical custody. To equate them was said to be "flagrant error." Id. at 602. Parole has now been equated with physical custody. Jones

v. Cunningham. However, to equate parole with probation is still "flagrant error."

Because probation does not constitute a restraint on liberty as does parole, Arketa is not authority for issuance of the writ in the instant case. Additionally, there remains the consideration of prematurity. Arketa claimed an immediate possibility of probation; appellant claims only the future possibility of parole. . . Arketa is thus reconciled with McNally, and distinguished from appellant's case.

This view gains assurance from this court's decision in Barquera v. California, 374 F.2d 177 (9th Cir. 1967). Barquera was convicted for sale of heroin on July 10, 1961, and sentenced to be imprisoned for five years to life. The next day he was convicted for possession of narcotics and sentenced to imprisonment for two to twenty years. Barquera petitioned for habeas corpus. This court held that, because Barquera could not overcome his first conviction, it was unnecessary to consider his attack on the subsequent conviction.

Had this court adopted the view of the Fourth Circuit, it would have reviewed Barquera's contentions as to his second conviction on the basis that it might affect his chances for parole under the prior valid judgment. See Williams v. Peyton, supra.

Appellant urges more than an erosion of the

McNally doctrine. He asks this Court to overrule the Supreme Court by declaring that McNally no longer is the law of the land. We have shown that existing authorities neither require nor permit this. Moreover, the policies underlying application of the McNally doctrine to cases involving state prisoners still warrant service. Federal courts traditionally have refused to tax the delicate federal-state relationship by overturning a state court judgment, upheld by state reviewing courts, in order to render an opinion which may be advisory. There is no reason to alter this stance.

The McNally doctrine promotes the policy of finality of judgments. Finality is not achieved at the cost of freedom, however, for collateral attacks on judgments may be made in state courts.

The number of petitions for habeas corpus ever increases. The vast majority of petitions advance frivolous claims. McNally screens out petitions asserting claims which are almost certainly frivolous and which may never need to be heard.

The scope of the Great Writ is a matter which the Supreme Court has reserved to itself. McNally, supra, at 136, 55 S.Ct. at 26, 79 L.Ed. at 241. We submit that the circuit courts should accord the high court complete deference on this question.

To abrogate the statutory requirement of custody

as a condition for the availability of the writ by redefining the concept of "restraint of liberty," as the Fourth Circuit has done, is to intrude upon a sensitive area: the power of the Supreme Court to adjudicate only actual cases and controversies. U.S. Const. art. III, §2.

It is doubtful whether an attack upon a conviction which is not now, and may never be, the basis for detention, presents a case or controversy in the constitutional sense. Resolution of this question lies within the peculiar competence of the Supreme Court. Surely, at some point, the statutory rule requiring that a petitioner be "in custody," merges with the constitutional rule limiting the adjudicatory power of the high court to actual cases or controversies. The Supreme Court must be permitted to determine where that intersection occurs.

CONCLUSION

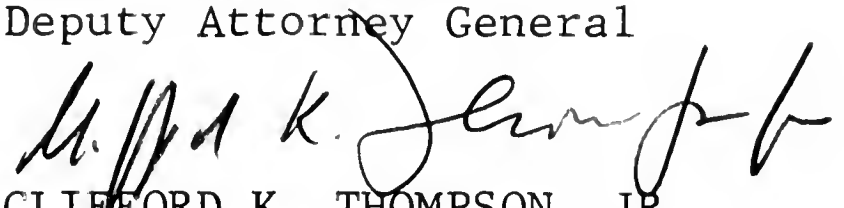
Appellant, in applying for a Certificate of Probable Cause, confined himself to the District Court's application of the McNally doctrine (TR 209). The Certificate of Probable Cause issued, expressly limited to this, the sole question resolved by the District Court (RT 216). If appellant prevails on the procedural point, his contentions on the merits first must be made before the District Court, not before this appellate court. Accordingly, we respond only to appellant's argument on the procedural issue.

For the reasons stated, it is respectfully submitted that the order of the District Court denying appellant's petition for the writ of habeas corpus must be affirmed.

DATED: October 9, 1967

THOMAS C. LYNCH, Attorney General
of California

DERALD E. GRANBERG
Deputy Attorney General



CLIFFORD K. THOMPSON, JR.
Deputy Attorney General

Attorneys for Appellees

CKT/gb
CR-SF
65-2294

CERTIFICATE OF COUNSEL

I certify that, in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

DATED: October 9, 1967

CLIFFORD K. THOMPSON, JR.
Deputy Attorney General
of the State of California

D. Wood

IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA
IN AND FOR THE COUNTY OF LOS ANGELES

MINUTES

December 11, 1958 Present Hon. MAURICE C SPARLING Judge

THE PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff,

vs.

ROBERTO VARGAS GARCIA Defendant,

Department No. 41

208242

Deputy District Attorney Kenneth J Thomas and the Defendant with counsel, Deputy Public Defender Walter Slosson, present. Defendant's motion to set aside his plea is denied. The prior conviction is found true. Probation denied. The defendant is sentenced as indicated.

Whereas the said defendant having duly pleaded guilty in this court of the crime of VIOLATION OF SECTION 11500, Health and Safety Code of the State of California, (Possession), a felony, as charged in the information; prior conviction proven true as alleged, to wit: Violation of Section 11500, Health and Safety Code, a felony, Superior Court of the State of California, Los Angeles County, August 26, 1954

C. I. M.
1958 DEC 26 PM 2:
G.C.ADMITTANCE

It is Therefore Ordered, Adjudged and Decreed that the said defendant be punished by imprisonment in the California XXXXXXXXXXXXXXXXXXXXXXXX State Prison for the term prescribed by law.

It is further ordered that the defendant be remanded into the custody of the Sheriff of the County of Los Angeles, to be by him delivered into the custody of the Director of Corrections at the California XXXXXXXXXXXXXXXXXX State Prison at Chino.

W C Kelley

Pen. .... CYA ....
CO. J. .... C. C. ....
Sher. .... Psyc. .... Misc. ....

This Minute Order has been entered on DEC 16 '58
HAROLD J. OSTLY, County Clerk and Clerk of the Superior Court of the State of California, in and for the County of Los Angeles.

By .... Deputy

MINUTES — State Prison
XXXXXXX (MEN)

EXHIBIT A

IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA
IN AND FOR THE COUNTY OF LOS ANGELES

JUDGMENT

Department No. 118

January 30, 1963 19__ Present Hon. JOHN G BARNES Judge

THE PEOPLE OF THE STATE OF CALIFORNIA, vs

ROBERTO VARGAS GARCIA 265838

Cause is called for trial. Deputy District Attorney B Denmark and the Defendant with counsel A Matthews and F Cooper, present. Defendant and all counsel waive trial by jury. Pursuant to stipulation it is ordered that it be deemed that William King, a chemist, has been called, sworn and testified in accordance with record of official reporter. Howard C Evans is sworn and testifies for the People. People's Exhibits 1 (envelope and contents), 2 (key), 3 (letter), 4 (receipt), 5 (certified copies of records of the Department of Corrections)and 6 (certified copies of records of the California Youth Authority) are admitted in evidence. Defendant's motion to suppress evidence is overruled. People and Defendant rest. Defendant makes closing statement to the Court. The priors charged are found to be true and Defendant is found to be "Guilty" as charged. Defendant refuses to fil application for probation and request immediate sentence. Sentenced as indicated.

Whereas the said defendant having been duly found guilty in this court of the crime of VIOLATION OF SECTION 11500, Health and Safety Code, a felony, as charged in the information; prior convictions having been found true as alleged, to wit: Violation of Section 11500, Health and Safety Code, a felony, Superior Court of the State of California, Los Angeles County, August 26, 1954 and Violation of Section 11500, Health and Safety Code, a felony, Superior Court of the State of California, Los Angeles County, December 11, 1958 and served a term in the State Prison

It is Therefore Ordered, Adjudged and Decreed that the said defendant be punished by imprisonment in the State Prison for the term prescribed by law.

It is further Ordered that the defendant be remanded into the custody of the Sheriff of the County of Los Angeles, to be by him delivered into the custody of the Director of Corrections at the California State Prison at Chino.

This minute order was entered
FEB 4 1963 C. A. Rhetta
WILLIAM G. SHARP, COUNTY CLERK and Clerk of the Superior Court BY C. A. RHETTA, DEPUTY

Prob. / Aud. DMV
LAPD / Cshr. CYA
CO. J. / Juv. C. Clk.
Sher. / Psyc. Misc.

This Minute Order has been entered on ..... WILLIAM G. SHARP, County Clerk and Clerk of the Superior Court of the State of California, in and for the County of Los Angeles.

By ..... Deputy

JUDGMENT — State Prison
(Men)

This is to certify that the foregoing is a true and correct copy of the original on file in my office.
Dated:
WILLIAM G. SHARP, County Clerk By ..... Deputy

EXHIBIT B

Nos. 21894, 21894-A, 21894-B, 21894-C

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

JORDANOS', INC., MADELINE F. JORDANO, HOWARD H. KING and DELFINA I. KING, HELEN M. JORDANO

Petitioners on Review,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent on Review.

BRIEF FOR APPELLANTS.

SCHAUER, RYON & MCINTYRE,

and

JERRY F. BROWN,

26 East Carrillo Street,
P.O. Box 210,
Santa Barbara, Calif. 93102,

Attorneys for Appellants.

Parker & Son, Inc., Law Printers, Los Angeles. Phone MA. 6-9171.

Nos. 21894, 21894-A, 21894-B, 21894-C

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

JORDANOS', INC., MADELINE F. JORDANO, HOWARD H. KING and DELFINA I. KING, HELEN M. JORDANO

Petitioners on Review,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent on Review.

BRIEF FOR APPELLANTS.

SCHAUER, RYON & MCINTYRE,

and

JERRY F. BROWN,

26 East Carrillo Street,
P.O. Box 210,
Santa Barbara, Calif. 93102,

Attorneys for Appellants.

Parker & Son, Inc., Law Printers, Los Angeles. Phone MA. 6-9171.

TOPICAL INDEX

TABLE OF AUTHORITIES CITED

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Statutes and Regulations

Nos. 21894, 21894-A, 21894-B, 21894-C

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

JORDANOS', INC., MADELINE F. JORDANO, HOWARD H. KING and DELFINA J. KING, HELEN M. JORDANO,

Petitioners on Review,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent on Review.

BRIEF FOR APPELLANTS.

Jurisdiction.

These appeals are brought to review the decision of the Tax Court of the United States. The Tax Court had jurisdiction under Section 7442 of the Internal Revenue Code of 1954, and this Court has jurisdiction to review the judgment under Section 7482(a) of the Internal Revenue Code of 1954. The pleadings showing the existence of these jurisdictions will be found at pages 1, 18, 31, 44, 108, 114, 119 and 124 of the Transcript of the Record.

Statement of Case.

This controversy was occasioned by the deduction by petitioner, Jordanos', Inc., of certain payments to widows of deceased employee stockholders, and the failure of the said widows to include such payments in their returns as income.

By stipulation, the only issues to be determined are the deductibility of the payments in the amount of $13,200.00 by petitioner Jordanos', Inc., for the taxable year ended June 30, 1961, and the inclusion of the payments of $4,440.00 received by each of the petitioners, Madeline F. Jordano, Delfina I. King and Helen M. Jordano, as income in each of the years ended December 31, 1958, 1959 and 1960. [Clk. Tr. p. 6, line 21, to p. 7, line 2.]

A fair conclusion of the factual situation is as follows:

1. Petitioner, Jordanos', Inc., is a California corporation which owns and operates a chain of grocery stores, distributes meat and produce as a wholesaler and acts as a wholesale distributor for beer in and around Santa Barbara County, California. [Tr. of Rec. p. 63.]

2. Petitioner, Jordanos', Inc., regularly keeps its books and prepares its income tax returns on a fiscal year basis ending June 30, and on an accrual method of accounting. It filed a timely return for the fiscal year ended June 30, 1961. [Tr. of Rec. p. 76.]

3. Petitioner, Jordanos', Inc., is the present successor to a grocery business partnership originally started by four brothers, Dominic Jordano, Frank Jordano, John Jordano, Sr., and Peter Jordano, upwards of forty years ago in Santa Barbara, California. The partnership business was transferred to a corporation in 1928, transferred back to a partnership in 1944, and again transferred to a corporation, the present petitioner, in 1946, but at all times the business was and is owned in approximately equal shares by the

founding brothers or their wives and/or children. [Tr. of Rec. pp. 65, 66 and 76.]

4. On November 27, 1931, Peter Jordano died. At the time of his death he was a director and shareholder of Jordano Bros., Inc. At the time of Peter Jordano's death petitioner Delfina I. King was Peter's surviving spouse. [Tr. of Rec. pp. 66 and 78.]

5. On August 3, 1944, Dominic Jordano died. At the time of his death he was a director, shareholder, and the president of Jordano Bros., Inc. Petitioner Madeline F. Jordano is the surviving widow of Dominic Jordano. [Tr. of Rec. pp. 66, 67 and 78.]

6. On January 20, 1956, John Jordano died. At the time of his death he was a director, shareholder, and the president of the corporation. Petitioner Helen M. Jordano is the surviving widow of John Jordano. [Tr. of Rec. pp. 67 and 79.]

7. Upon the deaths of each of Peter Jordano, Dominic Jordano and John Jordano, Sr., the business began making payments of $370.00 per month to their widows. [Tr. of Rec. pp. 67, 78 and 79.]

8. Petitioner Jordanos', Inc., has from the time of its incorporation continued the payments to the widows pursuant to the following and other similar resolutions:

> WHEREAS, for some time past this corporation has paid to Delfina Jordano the sum of $370.00 per month, in semimonthly payments of $185.00, and has paid similar amounts to Madeline Jordano, and
>
> WHEREAS, said payments, and each of them, constituted pension payments to said individuals,

having been based wholly upon their needs and their lack of other adequate means of support and without obligation on the part of this corporation to make or continue to make such payments, and

WHEREAS, said payments have been made from their inception, with the authorization of this board and with the consent of all its shareholders, upon the understanding and with the intent that all such payments would be wholly gratuitous, terminable at will by this corporation and without obligation of repayment, and

WHEREAS, said payments have been erroneously and without authority charged against the accounts with this corporation of said Delfina Jordano and Madeline Jordano,

RESOLVED, that all simimonthly pension payments of $185.00 by this corporation to Delfina Jordano and Madeline Jordano are hereby ratified and approved as gratuities for which the corporation has never expected or intended to receive reimbursement, and

RESOLVED FURTHER, that all erroneous entries in the corporate books and records, charging said semimonthly payments against the accounts of said Delfina Jordano and Madeline Jordano, be corrected by appropriate book entries reversing said charged; and

RESOLVED FURTHER, that for the fiscal year beginning July 1, 1953 and ending June 30, 1954, this corporation continue to pay the sum of $370.00 per month to Delfina Jordano, and a similar sum to Madeline Jordano, as gratuities, sub-

ject to termination by this board at any time during said year and without any obligation to make or continue to make such payments for any period.

WHEREAS, Madeline Jordano and Delfina Jordano, widows of Dominic Jordano and Peter J. Jordano, respectively, have been in need of financial assistance at all times since June 30, 1954, to date, and

WHEREAS, the corporation without obligation on its part so to do and with the full consent of all members of the Board of Directors has made semi-monthly payments of $185.00 to each widow from June 30, 1954, to date, and

WHEREAS, said payments and each of them constituted gifts to said individuals, having been based wholly upon their needs and their lack of other adequate means of support and without obligation on the part of this corporation to make or continue such payments, and

WHEREAS, said payments have been made with the knowledge and consent of all of the shareholders and upon the understanding and with the intent that all such payments would be wholly gratuitous, terminable at will by this corporation, and without obligation of repayment,

RESOLVED, that all semi-monthly payments of $185.00 made by this corporation to Madeline Jordano and Delfina Jordano for the period from June 30, 1954, to date be hereby ratified and approved as gratuities made without obligation or expectation of repayment.

RESOLVED, FURTHER, that subject to the approval of the stockholders of the corporation and until further action by the Board of Directors, this corporation continue to pay the sum of $370.00 per month to Madeline Jordano and a similar sum to Delfina Jordano as gratuities, and without obligation or expectation of repayment on their part, and subject to the following conditions which are expressly made a part of this resolution:

(1) That the corporation is recognized to be under no legal obligation to make any pension payments or other payments to them as the widows of Dominic Jordano and Peter J. Jordano, and that they possess no legal right to enforce any gratuities or pension payments whatsoever from the corporation.

(2) That said payments are expressly conditioned on the corporation's being financially able to make the same without any impairment to or hardship on its financial structure.

(3) That said payments are to be in any event terminable at the will of the corporation and subject to the approval of the stockholders. [Tr. of Rec. pp. 67 and 80.]

9. The Board of Directors of petitioner Jordanos', Inc., in passing such resolutions and authorizing such payments were motivated principally by the financial needs of the widows. [Clk. Tr. p. 17; Tr. of Rec. p. 80, lines 23-25, p. 18, lines 1-7, p. 20, line 25, p. 21, lines 1-5, and p. 22, lines 4-23.]

10. During the fiscal year ended June 30, 1961, petitioner Jordanos', Inc., took a deduction in its income tax return in the amount of $13,200.00 which represented the payment to the widows during that fiscal year. [Tr. of Rec. p. 80.]

11. Petitioners Helen M. Jordano, Madeline F. Jordano, and Delfina I. King each filed timely income tax returns on the cash receipts and disbursements basis for the calendar years 1958, 1959 and 1960. They did not include as income in their returns the amounts of $4,440.00 received each year by each petitioner, from petitioner Jordanos', Inc. [Tr. of Rec. p. 80.]

12. Each of the petitioners Helen M. Jordano, Madeline F. Jordano and Delfina I. King, are women of modest means who do not have sufficient property or income to maintain themselves without the payments to them by petitioner Jordanos', Inc. [Tr. of Rec. p. 81.]

Specification of Errors.

1. The Tax Court erred in its Decision that there are deficiencies in income taxes due from petitioner Jordanos', Inc. to the extent that such deficiencies arose from the disallowance as a business expense of the payments made to the individual petitioners. This decision [Tr. of Rec. p. 89] is not supported by any finding of the Court. The Memorandum Findings of Fact and Opinion [Tr. of Rec. pp. 75 through 88] nowhere contains any finding as to whether or not the payments were a reasonable and necessary business

expense as contended by petitioner Jordanos', Inc. In its opinion the Court stated only ". . . Under the circumstances we hold that the payments did not constitute compensation for services or otherwise reflect any reasonable benefit to the Corporation. . . ." [Tr. of Rec. p. 84.] That does not constitute a finding that the payments were not a reasonable and necessary business expense.

2. The Tax Court erred in its finding that the payments to the widows constituted a distribution of earnings and profits, and therefore a dividend by the corporation to three of its major stockholders. [Tr. of Rec, p. 82.]

The Court in making this finding ignored its own findings that the payments were made voluntarily by the Corporation without any consideration to it [Tr. of Rec. p. 80], were based wholly upon the widows' needs [Tr. of Rec. p. 80], and that none of the widows were ever a director. [Tr. of Rec. p. 80.]

ARGUMENT.

1. Deductibility of Payments Made to Widows.

The Internal Revenue Service and the Courts have long recognized the deductibility of a payment to a widow under the usual situation where the payment is prompted by mixed motives, which include not only a desire to assist the widow in mitigating the loss of her financial support but also a desire to obtain for the employer a benefit through increased morale or good will of the other employees and officers.

In 1939, under I. T. 3329, the Internal Revenue Service stated:

> "Payments made . . . to the widow of an officer stockholder . . . though not required to be made by any contractual obligation, are deductible by the corporation as business expenses. Such amounts are gifts to the widow, and, therefore, are not taxable income to her."

The Courts have long recognized the deduction. *Champion Spark Plug Company,* 30 TC 26; *Fifth Avenue Coach Lines,* 31 TC 111; *Paterson Vehicle Company,* 20 TCM 774, Dec. 24,867 (M), T.C. Memo 1961-154.

In general, payments of premiums on insurance on the lives of employees are deductible by the payor corporation and similarly payments made into a profit sharing or pension fund are deductible by the payor-corporation. *L. O. 1014, 2 CB 88; Sec. 404(a) I.R.C., 1954.*

Petitioner, Jordanos' Inc., in making the payments to the widows was carrying out a policy of the company

established many years prior by which the company, at a time when group insurance and pension plans were largely unheard of, could assure its principal officers that their widows would be cared for in the event of an early demise. Unquestionably this policy attracted and held qualified executives as each son of the original founding brothers gradually worked into the company and eventually became, and stayed, an executive. That this was a successful plan is seen in the fact that the business grew from a local grocery story in its inception to a corporation doing in excess of $20,000,000.00 per year gross receipts.

The relatively small amounts paid to the widows can certainly be found to be "reasonable" under the circumstances.

2. Taxability of Payments Received by Widows.

It is accepted practice in our modern business community for an employer voluntarily to make payments to the widow of an employee following the death of a husband. The district courts have steadily and consistently found that voluntary death payments were tax free to the widow.

Reed v. United States, 177 F. Supp. 205 (D.C. Ky., 1959), affirmed 277 F. 2d 456 (6th Cir. 1960);

Cowan v. United States, 191 F. Supp. 703 (D.C. Ga., 1960);

Frankel v. United States, 192 F. Supp. 776 (D.C. Minn., 1961), affirmed ..... F. 2d .... (8th Cir., 1962);

Wilner v. United States, 195 F. Supp. 786 (D.C. N.Y., 1961);

Rice v. United States, 197 F. 2d 223 (D.C. Wis., 1961);

Kasynski v. United States, 284 F. 2d 143 (10th Cir., 1960).

The Tax Court shared this inclination for a long time; however, after the Supreme Court's decision in *Duberstein v. Commissioner,* 363 U.S. 278 (1960), the Tax Court shifted its position.

Following the decision in *Duberstein,* the Tax Court handed down a decision in *Estate of Mervin G. Pierpont,* 35 TC 65 (1960), (reversed and remanded sub. nom. *Poyner v. Commissioner,* 301 F. 2d 287, 4th Cir., 1962) adverse to the widow, which provided a foundation for a string of Tax Court cases all holding that the payment to the widow was taxable income.

Roy I. Martin, 36 TC ..... (1961), on appeal C. A. 3;

Mary C. Westphal, 37 TC ..... (1961);

Estate of Martin Kuntz, Sr., 19 TCM 1379 (1960), reversed 300 F. 2d 849 (6th Cir., 1962);

Estate of W. R. Olsen, 20 TCM 807 (1961), reversed ..... F. 2d ..... (8th Cir. 1961).

However, recently the widow has dealt the Tax Court a deadly blow by upsetting its post-Duberstein rationale on three separate occasions before three different Courts of Appeal. (*Poyner v. Commissioner, supra; Estate of Martin Kuntz, Sr., supra;* and *Estate of W. R. Olsen, supra.*)

In perhaps the most resounding defeat dealt the Tax Court, the Eighth Circuit in the *Olsen* case, *supra,*

flatly rejected the *Pierpont* rationale and refused to send the case back to the Tax Court for further proceedings. The Court pointed out that there was no obligation or duty on the employer to make a payment to the widow. It noted that the only reasonable inference to be drawn from the undisputed evidence was the payment to the widow was a gift.

The significant factors generally considered to be determinative, that a payment to a widow constitutes a gift, as set forth in *Arthur W. Hellstrom,* 24 TC 916 (1955) are that the payments are made to the widow, not the estate; that there was no obligation to make the payment; that there was no benefit to the corporation from the payment; that the widow rendered no services to the corporation, and that the decedent had been fully compensated for his past services.

The case at bar seems to contain all of the necessary ingredients to constitute a gift within the meaning of the tax law.

The payments in each case were made directly to the widow. There was no legal obligation on the part of the corporation to make payments. As to the question of moral obligation the 8th Circuit Court has disposed of this assertion in *Estate of Olsen v. Commissioner,* 302 F. 2d 666 (CA-8), cert. denied 371 U.S. 903, by observing

> ". . . We are not aware that a corporation has any moral obligation or duty to make any payment to a widow of a deceased officer or employee who, while he lived, was fully compensated for his services. . . ."

The widows here rendered no services to the corporation, and no benefits flowed to the corporation by virtue of the payments. The deceased officers were fully compensated.

Thus it appears from the record that this Court has adequate grounds for finding a gift based upon the factors generally conceded to be controlling and specifically on the test given in *Commissioner v. Duberstein*, 363 U.S. 278, that of a transfer proceeding from a "detached and disinterested generosity" or of feelings of "affection, respect, admiration, charity or like impulses."

SCHAUER, RYON & MCINTYRE,

and

JERRY F. BROWN,

Attorneys for Appellants.

Certificate.

I certify that, in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

JERRY F. BROWN

Nos. 21,894 -- 21,894C

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

JORDANOS', INC., Petitioner

v.

COMMISSIONER OF INTERNAL REVENUE, Respondent

MADELINE F. JORDANO, Petitioner

v.

COMMISSIONER OF INTERNAL REVENUE, Respondent

HOWARD H. KING and DELFINA I. KING, Petitioners

v.

COMMISSIONER OF INTERNAL REVENUE, Respondent

HELEN M. JORDANO, Petitioner

v.

COMMISSIONER OF INTERNAL REVENUE, Respondent

ON PETITIONS FOR REVIEW OF THE DECISIONS
OF THE TAX COURT OF THE UNITED STATES

BRIEF FOR THE RESPONDENT

MITCHELL ROGOVIN,
Assistant Attorney General.

LEE A. JACKSON,
DAVID O. WALTER,
HOWARD M. KOFF,
Attorneys,
Department of Justice,
Washington, D.C. 20530.

I N D E X

CITATIONS

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

No. 21,894

JORDANOS', INC., Petitioner

v.

COMMISSIONER OF INTERNAL REVENUE, Respondent

No. 21,894A

MADELINE F. JORDANO, Petitioner

v.

COMMISSIONER OF INTERNAL REVENUE, Respondent

No. 21,894B

HOWARD H. KING and DELFINA I. KING, Petitioners

v.

COMMISSIONER OF INTERNAL REVENUE, Respondent

No. 21,894C

HELEN M. JORDANO, Petitioner

v.

COMMISSIONER OF INTERNAL REVENUE, Respondent

ON PETITIONS FOR REVIEW OF THE DECISIONS
OF THE TAX COURT OF THE UNITED STATES

BRIEF FOR THE RESPONDENT

OPINION BELOW

The memorandum findings of fact and opinion of the Tax Court (I-R. 74-88) are not officially reported.

JURISDICTION

These petitions for review (I-R. 108-128) involve federal income taxes for the taxable years 1958 through 1961. On July 29, 1964, the Commissioner of Internal Revenue mailed to the taxpayers notices of deficiency, asserting deficiencies in those taxes in the taxable years 1958 through 1961 in the aggregate amount of $25,121.30. (I-R. 7-13, 22-27, 35-40, 48-54.) Within ninety days thereafter, on October 26, 1964, the taxpayers filed petitions with the Tax Court for a redetermination of those deficiencies under the provisions of Section 6213 of the Internal Revenue Code of 1954. (I-R. 1-13, 18-27, 31-40, 44-54.) The decisions of the Tax Court were entered on January 23, 1967. Pursuant to these decisions, the asserted deficiencies were redetermined in the aggregate amount of $23,914.01. (I-R. 89, 95, 101, 107.) These cases are brought to this Court by petitions for review mailed April 20, 1967 (I-R. 113), within the three-month period prescribed in Section 7483 of the Internal Revenue Code of 1954. 1/ Jurisdiction is conferred on this Court by Section 7482 of that Code.

QUESTION PRESENTED

Whether the Tax Court correctly held that the payments by the closely-held family corporation to the shareholding widows constituted dividends.

1/ Under the Code, timely mailing is the equivalent of timely filing. See Section 7502 of the Internal Revenue Code of 1954.

STATUTES INVOLVED

Internal Revenue Code of 1954:

SEC. 102. GIFTS AND INHERITANCES.

(a) General Rule.--Gross income does not include the value of property acquired by gift, bequest, devise, or inheritance.

* * * * *

(26 U.S.C. 1964 ed., Sec. 102.)

SEC. 162. TRADE OR BUSINESS EXPENSES.

(a) In General.--There shall be allowed as a deduction all the ordinary and necessary expenses paid or incurred during the taxable year in carrying on any trade or business, including--

(1) a reasonable allowance for salaries or other compensation for personal services actually rendered;

* * * * *

(26 U.S.C. 1964 ed., Sec. 162.)

SEC. 316. DIVIDEND DEFINED.

(a) General Rule.--For purposes of this subtitle, the term "dividend" means any distribution of property made by a corporation to its shareholders--

(1) out of its earnings and profits accumulated after February 28, 1913, or

* * * * *

(26 U.S.C. 1964 ed., Sec. 316.)

SEC. 404 [as amended by Sec. 24, Technical Amendments Act of 1958, P.L. 85-866, 72 Stat. 1606]. DEDUCTION FOR CONTRIBUTIONS OF AN EMPLOYER TO AN EMPLOYEES' TRUST OR ANNUITY PLAN AND COMPENSATION UNDER A DEFERRED-PAYMENT PLAN.

(a) General Rule.--If contributions are paid by an employer to or under a stock bonus, pension, profit-sharing, or annuity plan, or if compensation is paid or accrued on account of any employee under a plan

deferring the receipt of such compensation, such contributions or compensation shall not be deductible under section 162 (relating to trade or business expenses) or section 212 (relating to expenses for the production of income; but, if they satisfy the conditions of either of such sections, they shall be deductible under this section, subject, however, to the following limitations as to the amounts deductible in any year:

* * * * *

(5) Other plans.--In the taxable year when paid, if the plan is not one included in paragraph (1), (2), or (3), if the employees' rights to or derived from such employer's contribution or such compensation are nonforfeitable at the time the contribution or compensation is paid.

* * * * *

(26 U.S.C. 1964 ed., Sec. 404.)

STATEMENT

The facts, as found by the Tax Court (I-R. 76-82), are as follows:

Jordanos', Inc. (herein referred to as the Corporation) was incorporated on January 28, 1946, under the laws of California. It has its principal place of business at 35 West Canon Perdido Street, Santa Barbara, and it filed its corporation income tax returns for the taxable years involved herein with the District Director of Internal Revenue, Los Angeles, California. It regularly keeps its books and records and reports its income for federal income tax purposes on an accrual method of accounting. (I-R. 76.)

Helen M. Jordano is an individual residing at Rosario Park, Star Route, Santa Barbara, California. Madeline F. Jordano is an individual residing at 1625 Overlook Lane, Santa Barbara, California.

Howard H. King 2/ and Delfina I. King are husband and wife residing at 1217-B East Cota Street, Santa Barbara, California. All the individual taxpayers filed their respective income tax returns on the cash basis for the taxable years involved herein with the District Director of Internal Revenue at Los Angeles, California. (I-R. 76-77.)

The corporation is a final successor to a partnership started by four brothers, Dominic Jordano, Frank James Jordano, Sr., John Jordano, Sr., and Peter Jordano, about 40 years ago. Each brother continued active in the business until his death. The business consists of the ownership and operation of a chain of grocery stores and acting as a wholesaler of meat and produce, as well as beer. (I-R. 77.)

Since its inception, the entire business (save for unimportant minority interests) has been owned and controlled by the Jordano families. With the exception of 1,000 shares of non-voting preferred stock, at all relevant times the Jordano brothers, their wives, their children, and trusts for their benefit have owned practically all of the common stock of the corporation. 3/ Each of the four

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2/ Howard H. King is a party to this proceeding only by reason of having filed joint returns with Delfina I. King. (I-R. 76.)

3/ In June, 1947, the four families owned 600 shares, constituting all of the issued and outstanding shares. In January, 1957, there was a 20-for-1 split. During the taxable years, the four families owned 11,060 shares. No explanation was submitted with respect to the 940-share differential but the stipulation of facts states that except for the preferred shares, the corporation "has been solely owned and controlledat all times by the four Jordano brothers, or their wives and children." (Emphasis by the court.) (I-R. 77.)

family groups owned approximately the same number of shares and the widows had substantial interests within their respective family groups. 4/ (I-R. 77-78.)

Peter Jordano, one of the founding brothers, died in 1931. At his death he was a director and shareholder of a predecessor corporation. At that time, the predecessor corporation commenced monthly payments to his widow, Delfina, in the amount of $370 per month. Delfina later married Howard H. King. (I-R. 78.)

Dominic Jordano, also a founding brother, died in 1944. At the time of his death, he was a director, shareholder, and the president of a predecessor corporation. At that time, the predecessor corporation commenced similar monthly payments of $370 to his widow, Madeline. (I-R. 78.)

Prior to 1953 there had been no formal resolution by the board of directors of the corporation in regard to the payments to the then widows. In June, 1953, the board, noting the payments in the past to Delfina and Madeline and purporting to recognize their need for such payments, authorized continuing the payments at the same rate of $370 per month through June 30, 1954. In December, 1955, the board ratified the payments since June 30, 1954, and authorized their continuance without definite time limit but subject to the corporation's being financially able to make them and to the approval of

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4/ The family of John, Sr., owned 2,450 shares, of which Helen had a life interest in 1,000 shares; the family of Dominic owned 2,810 shares, of which Madeline owned 1,380 shares outright; the family of Peter owned 2,800 shares, of which Delfina owned 1,360 shares outright; and the family of Frank, Sr., owned 3,000 shares. (I-R. 78.)

the stockholders, and until further action by the board. (I-R. 78-79.)

On January 20, 1956, John Jordano, Sr., a third founding brother, died. At his death he was a director, shareholder, and the president of the corporation. Shortly after his death, the corporation paid his widow, Helen, a cash payment in the amount of $5,000. The payment was entered on the books and records of Jordanos', Inc., as "Employees Death Benefit." On February 1, 1956, the board passed a resolution authorizing payment at the rate of $370 per month to his widow from and after April 20, 1956, also without definite time limit but terminable at the will of the corporation, and subject to stockholder approval and the corporation's being financially able to make the payments. (I-R. 79.)

None of the corporation's other managerial employees were at any time aware of the payments to the three widows. (I-R. 79.)

Since the death of John Jordano, Sr., and through the time of trial, all three widows have continued to receive payments from the corporation at the rate of $370 per month. Prior to the years in question, the corporation had paid approximately $115,000 to Delfina, $58,000 to Madeline, and $13,000 to Helen. None of the widows has included the payments in her returns filed for the years in question or for any prior years. Each contends that the payments constitute nontaxable gifts. (I-R. 79-80.)

Prior to July 1, 1953, the payments to the widows were carried on the books of the corporation as indebtedness to it. For the fiscal year ended June 30, 1954, the payments were charged directly

to earned surplus as "pension payments." For the remaining fiscal years through June 30, 1960, the payments were charged to a non-operating expense account and similarly characterized. The corporation did not claim a deduction on its income tax returns for the payments for any year before its fiscal year ended June 30, 1961. For that year it deducted the payments as a business expense. It now contends that it is entitled to a business expense deduction for each of the years in question. (I-R. 80.)

In the three board resolutions authorizing the payments, it was recited that the corporation was under no legal obligation to the widows, that the payments were "wholly gratuitous" and were "based wholly upon [the widows'] needs and their lack of other adequate means of support." In the operative parts of the resolutions, the payments were characterized as "gratuities." Though none of the widows was ever a director, at the time of each resolution the board consisted solely of the surviving founding brothers and their sons. (I-R. 80.)

The following adjusted gross income was reported on the widows' respective income tax returns (I-R. 81):

Name	1958	1959	1960
Delfina	$7,866	$7,806	$3,543
Madeline	2,091	2,182	2,854
Helen	892	3,770	642

In 1958, Delfina was 65 years old, Madeline was 63, and Helen was 54. (I-R. 81.)

The financial condition of the widows as of June 30, 1961, was approximately as follows (I-R. 81):

Assets	Madeline	Delfina	Helen
Jordanos', Inc., stock	$138,000	$136,000	Life interest in 1,000 shares
Other stock	37,000	5,000	None
Cash in bank	5,000	6,000	$14,000
Loans	7,500	6,055	None
Real property	35,000	15,000	60,000
Insurance policy (face value)	None	5,000	None

The following table sets forth the gross receipts, net income, earned surplus, and dividends paid by the corporation for the taxable years after June 30, 1953 (I-R. 82):

Year Ended	Gross Receipts	Net Income* after taxes	Earned Surplus	Common stock dividends
6-30-54	$ 7,811,178	$30,032	$420,877	$9,344
6-30-55	8,041,630	29,393	436,611	9,088
6-30-56	8,373,592	48,797	470,071	9,088
6-30-57	8,801,346	34,645	468,589	4,500
6-30-58	10,519,276	34,376	490,590	8,848
6-30-59	13,543,719	62,959	540,166	8,848
6-30-60	15,487,069	13,798	541,072	8,848
6-30-61	16,691,678	62,469	592,109	8,848
6-30-62	20,755,624	69,938	671,298	8,848

* Except for fiscal year ended June 30, 1954, does not include payments made to the widow petitioners.

On the basis of these evidentiary findings and other facts of record, the Tax Court made the following ultimate finding of fact (I-R. 82):

> The payments to the widows constituted a distribution of earnings and profits and therefore a dividend by the Corporation to three of its major shareholders.

Accordingly, the Tax Court sustained the Commissioner's determination of deficiencies in income taxes for the taxable years, in the amounts stated above. (I-R. 82-88.)

SUMMARY OF ARGUMENT

In resolving the basically factual issue before it -- whether certain payments made by the corporation (a closely-held family corporation) to the recipients (shareholding widows) constitute dividends or something else -- the Tax Court determined that the payments constituted dividends. (Thus, the payments were neither deductible to the corporation nor excludable from income by the recipients.) In so doing, it took into consideration facts which, at the least, tended to show that the payments were neither business-oriented nor intended as gifts; on the contrary, the facts demonstrated that the payments were in reality dividends. The payments endured over long periods of time; they were made without limitation of time; the corporation had a poor dividend history; it possessed sufficient earnings and profits during the taxable years as a source for making the payments; and the shareholding widows and their children owned approximately 73 percent of the outstanding common stock. Whatever force, if any, there is in the taxpayers' argument before this Court, it surely is not sufficient to warrant, let alone require, a reversal on the ground that the ultimate finding of fact below is clearly erroneous.

ARGUMENT

THE TAX COURT CORRECTLY HELD THAT THE PAYMENTS BY THE CLOSELY-HELD FAMILY CORPORATION TO THE SHAREHOLDING WIDOWS CONSTITUTED DIVIDENDS. HENCE, THEY WERE NEITHER DEDUCTIBLE BY THE CORPORATION NOR EXCLUDABLE FROM INCOME BY THE WIDOWS

Whether or not a corporate distribution is a dividend or something else, such as a gift, compensation for services, repayment of a loan, interest on a loan, or payment for property purchased, represents a question of fact to be determined in each case. Commissioner v. Duberstein, 363 U.S. 278, 289; John Kelley Co. v. Commissioner, 326 U.S. 521; Union Stock Farms v. Commissioner, 265 F. 2d 712, 726, decided by this Court; Lengsfield v. Commissioner, 241 F. 2d 508 (C.A. 5th). Here the facts are not in dispute, only the inferences to be drawn therefrom. To weigh the evidence, to draw inferences from the facts, and to choose between inferences is, of course, the function of the trial court, and its determination is not to be disturbed unless clearly erroneous. Commissioner v. Duberstein, supra; United States v. Gypsum Co., 333 U.S. 364, rehearing denied, 333 U.S. 869; Union Stock Farms, supra; Lengsfield v. Commissioner, supra; Schner-Block Co. v. Commissioner, 329 F. 2d 875 (C.A. 2d).

After a full consideration of the facts, the Tax Court found that the payments were in reality dividends, and consequently they were neither deductible by the corporation nor excludable from income by the shareholding widows. This conclusion is amply supported by the facts; in any event it cannot be characterized as so clearly erroneous as to require reversal by this Court.

At the threshold, it should be borne in mind that the payments, which endured over long periods (see Carson v. United States, 317 F. 2d 370 (Ct. Cl.)), were made without limitation of time (see Schner-Block Co. v. Commissioner, supra). Instead, they were geared to the corporation's ability to pay. (I-R. 79.) Moreover, the corporation, which had a poor dividend history (I-R. 82) (see Schner-Block Co. v. Commissioner, supra), possessed sufficient earnings and profits during the taxable years as a source for making the payments. Lastly, the shareholding widows and their children owned approximately 73 percent of the outstanding common stock (I-R. 78) -- a significant point completely ignored by taxpayers. Under these circumstances, the payments in question directly respond to the definition of a taxable dividend contained in Section 316 of the Internal Revenue Code of 1954, supra.

The facts in the instant cases are strikingly similar to those in Lengsfield v. Commissioner, supra, a case relied on by the Tax Court, yet not even cited by taxpayers. There, as here, payments were made to three shareholding widows by a closely-held corporation. Payments had been made to one widow for some 23 years, to another widow for eight years, and to the remaining widow for two years. The corporate resolutions authorizing the payments characterized them as "gratuities." The widows owned 63 percent of the common stock and the remaining shares were owned by close relatives. The corporation had substantial earnings and profits during the period involved. On these facts, the Tax Court concluded that the payments were in reality dividends. Addressing itself to the taxpayers' contention that this

conclusion was clearly erroneous, the Fifth Circuit stated (p. 510): "We think the record supports, indeeed requires, this conclusion." See also Union Stock Farms v. Commissioner, supra; Schner-Block Co. v. Commissioner, supra; Barbourville v. Commissioner, 37 T.C. 7.

Despite the foregoing, taxpayers contend (Br. 9-13) that the payments were deductible by the corporation and excludable by the widows. These contentions were properly rejected by the Tax Court. (I-R. 83-86.) The record simply does not support taxpayers' contention that the payments were to serve as incentives or morale boosters to other managerial employees. 5/ On the contrary, as the Tax Court pointed out (I-R. 83), the other managerial employees were not even aware of the existence of these payments. Taxpayers' "gift" contention is equally without merit. 6/ Although the payments were purportedly made in recognition of the financial needs of the widows, it was stipulated that as of June 30, 1961, the widows possessed estates valued at approximately $222,500, $173,000 and $74,000 (plus a life estate in 1,000 shares of common stock in the corporation), respectively. (I-R. 70, 81.) Furthermore, as noted by the Tax

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5/ Thus, taxpayer-corporations's reliance on the judicial authorities cited on page 9 of its brief is misplaced. In each of those cases, the payments were held to have been made in recognition of the services previously rendered by the decedent-employee.

Similarly, I.T. 3329, 1939-2 Cum. Bull. 153, fails to support the claimed deduction. The payments involved therein were a continuation of salary. (I.T. 3329 was modified by I.T. 4027, 1950-2 Cum. Bull. 9, with respect to the taxability of the payments to the widow.)

6/ The cases cited by taxpayers (Br. 10-12) do not support their contention. In each case, the issue was whether the widow payments constituted a gift or compensation for services.

Court (I-R. 85), the fact that the payments remained constant over such protracted periods militates against taxpayers' gift theory. 7/

In essence, taxpayers' argument amounts to nothing more than a request that this Court substitute its own finding of fact under all of the circumstances here presented for that of the Tax Court -- a most inappropriate request in any case and, particularly, in a case such as this where no error of law has been demonstrated. Since the record establishes that the Tax Court's decisions are supported not merely by substantial evidence, but by the overwhelming weight of the evidence, and the proper legal standards were applied, the decision is clearly correct.

CONCLUSION

The decisions of the Tax Court should be affirmed.

Respectfully submitted,

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DECEMBER, 1967.

7/ Also, it is significant that, while the financial status of the widows varied substantially, the amount of the payment to each was identical.

CERTIFICATE

I certify that, in connection with the preparation of this brief, I have examined Rules 18, 19, and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

Dated: _____ day of December, 1967.

_____

Howard M. Koff, Attorney

No. 21,896

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

KEITH YAZZIE MANN,

Appellant,

v.

UNITED STATES OF AMERICA,

Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

BRIEF FOR THE APPELLEE

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EDWARD E. DAVIS,
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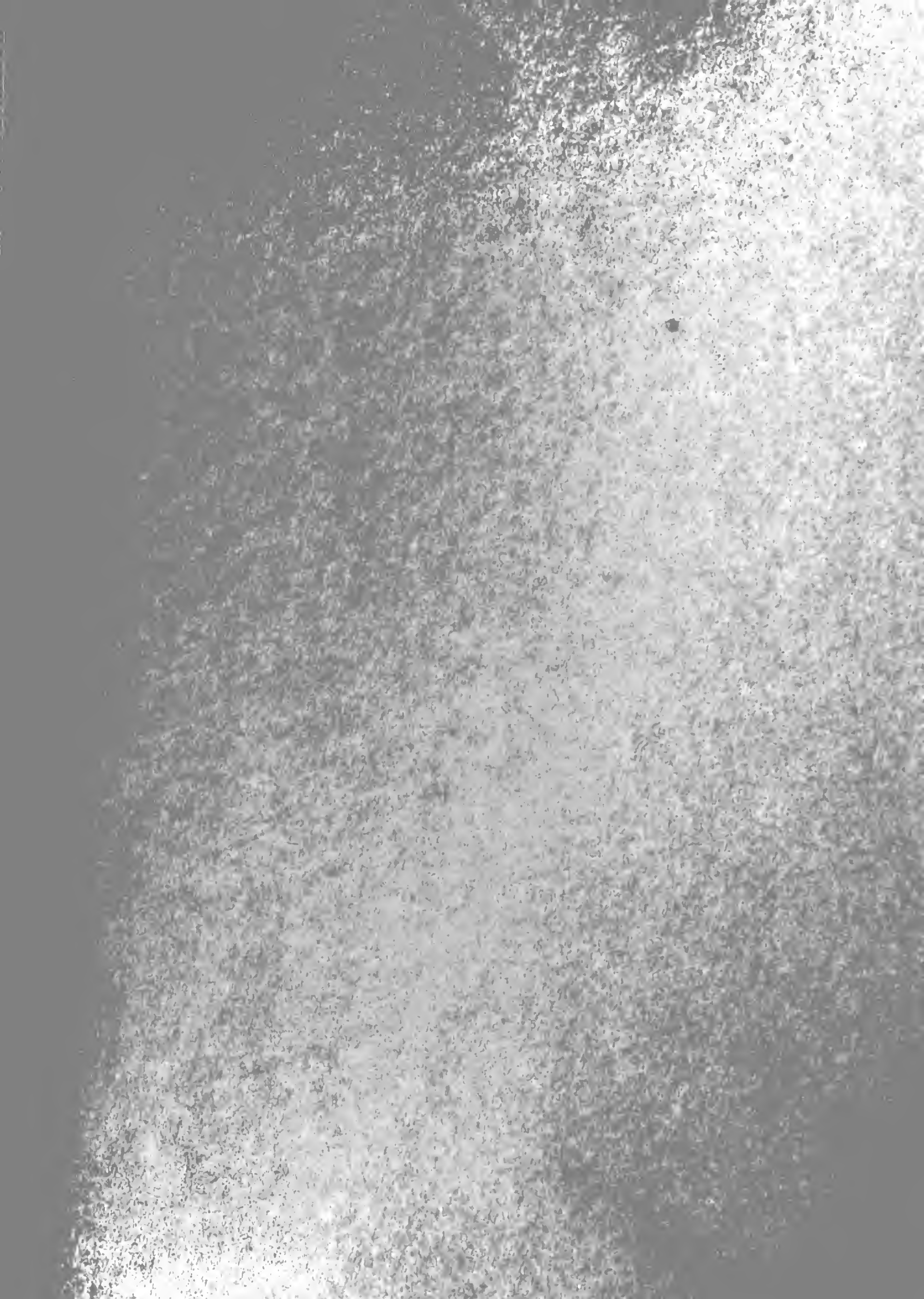

I N D E X

ases Cited

tatutes Involved

Miscellaneous

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 21,896

KEITH YAZZIE MANN,

Appellant,

v.

UNITED STATES OF AMERICA,

Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

BRIEF FOR THE APPELLEE

JURISDICTIONAL STATEMENT

This action was instituted by appellant in the District Court December 22, 1966, under the Federal Tort Claims Act, 28 U.S.C. 46(b), 2671 et seq., to recover damages for personal injuries stained on April 9, 1960 (R. 1-4). The District Court granted e Government's motion to dismiss, based on the 2 years' limi- tion in the Tort Claims Act, 28 U.S.C. 2401(b).(R. 17).

This Court has jurisdiction of the appeal under 28 U.S.C. 1291.

STATEMENT OF THE CASE

Appellant was born in Arizona about 23 years ago and is an Indian of the Navajo tribe (R. 2, 16). On December 22, 1966, he filed the present suit against the United States under the Federa Tort Claims Act, seeking damages for injuries sustained on April 9, 1960, at age 16, while he was a student at an Indian School in Utah administered by the Bureau of Indian Affairs.

The United States moved to dismiss under Rule 12(b) of the Federal Rules of Civil Procedure, pointing out that the action was barred because of the two-year limitation period prescribed by the Tort Claims Act. 28 U.S.C. 2401(b). Appellant opposed the motion on the ground that "being an Indian" he was entitled to a "more liberal interpretation" of the law (R. 11).

On February 20, 1967, the district court granted the Government's motion and dismissed the action (R. 17). This appeal followed (R. 18).

STATUTES INVOLVED

28 U.S.C. 1346(b) provides in pertinent part:

> (b) Subject to the provisions of chapter 171 of this title, the district courts . . . shall have exclusive jurisdiction of civil actions on claims against the United States, for money damages, accruing on and after January 1, 1945, for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.

28 U.S.C. 2401(b) provides in pertinent part:

> (b) A tort claim against the United States shall be forever barred unless action is begun within two years after such claim accrues or within one year after the date of enactment of this amendatory sentence, whichever is later . . .

* * *

ARGUMENT

SINCE APPELLANT'S ACTION UNDER THE FEDERAL TORT CLAIMS ACT WAS FILED MORE THAN TWO YEARS AFTER THE ACCRUAL OF HIS CLAIM, THE DISTRICT COURT HAD NO JURISDICTION TO ENTERTAIN THE SUIT.

It is settled that the United States may not be sued at all ıless Congress consents, and "the terms of this consent to be ıed in any court define that court's jurisdiction to entertain ıe suit." United States v. Sherwood, 312 U.S. 584, 586. Moreover, Congress prescribes a specific period within which a suit ainst the United States must be brought, that limitation is risdictional and "must be strictly observed and exceptions ereto are not to be implied." Soriano v. United States, 352 S. 270, 276. Indeed, the parties to a suit cannot waive risdictional limitations, and government officials cannot large the statutory time within which suit must be brought, even by their conduct they may have misled the other party to the it. Munro v. United States, 303 U.S. 36, 41; Pittman v. United ates, 341 F. 2d 739, 741 (C.A. 9), certiorari denied, 382 U.S. 1. 1/

1/ The cited cases establish the lack of merit in appellant's "stoppel" argument.

In light of these principles, it is clear that the District Court had no jurisdiction to entertain appellant's suit which was brought more than six years after his claim accrued. For 28 U.S.C. 2401(b) [2/] expressly provides that a "tort claim against the United States shall be forever barred unless action is begun within two years after such claim accrues . . ." (Emphasis added.)

That two-year statute of limitations is jurisdictional. Humphreys v. United States, 272 F. 2d 411, 412 (C.A. 9). And, as this Court has squarely ruled, it is not tolled during a claimant's minority. Pittman v. United States, supra; Brown v. United States, 353 F. 2d 578 (C.A. 9). Accord: Simon v. United States, 244 F. 2d 703 (C.A. 5). For, the purpose of the statute of limitations is to protect the government from "difficulty in meeting stale claims." Pittman, supra at 741. See also Hearings on H. R. 7236 Before Subcommittee No. 1 of the House Committee on the Judiciary, 76th Cong., 3rd Sess., p. 21; H. Rep't. No. 1754, 80th Cong., 2d Sess. p. 4. The express statutory language, its underlying purpose and the relevant decisions call for an affirmance here of the ruling below that the government's consent to suit ended completely after the expiration of the two-year period of limitations.

2/ This provision was amended on July 18, 1966 [P. L. 89-506, § 7, 80 Stat. 307] to require that all tort claims be first presented for administrative action within two years of accrual of the claimant prior to commencement of suit. The 1966 amendment applies to claims accruing six months or more after the date of its enactment (80 Stat. 308), and hence is inapplicable to the present case.

Appellant seeks to escape from such an affirmance by arguing that limitation periods do not apply to Indians. The short and conclusive answer to this argument is that Congress has not provided Indians with such a special immunity in the Tort Claims Act and, as noted by the Supreme Court, such exceptions from the limitation period "are not to be implied". Soriano v. United States, 352 U.S. 270, 276.

The need for application of the foregoing principles here is emphasized by the fact that it is "now well settled by many decisions . . . [the Supreme] Court that a general statute in terms applying to all persons includes Indians and their property interests." Federal Power Commission v. Tuscarora Indian Nation, 362 U.S. 99, 116. An Indian may not claim that he is not bound by the provisions of a general Act of Congress unless he can point to some express exclusionary provision in that Act or in some special treaty or other Act. Commissioner of Internal Revenue v. Walker, 326 F. 2d 261, 263 (C.A. 9). Indeed, when Congress has intended to exempt Indians from statutes of limitations, or to provide special and "fiduciary" handling of their legal affairs by the government, it has expressly so provided. See, e.g., 25 U.S.C. 70a; 372; United States Department of the Interior, Federal Indian Law, pp. 542-3. But Congress has not directed the government to deal differently with Indians with respect to the running of the limitation period in the Tort Claims Act.

CONCLUSION

For the foregoing reasons, the judgment of the district court should be affirmed.

Respectfully submitted,

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United States Attorney,

MORTON HOLLANDER,
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Washington, D.C. 20530.

NOVEMBER 1967.

CERTIFICATE

I certify that, in connection with the preparation of this brief, I have examined Rules 18, 19, and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

William Kanter
WILLIAM KANTER

AFFIDAVIT OF SERVICE

STRICT OF COLUMBIA)
) ss.
TY OF WASHINGTON)

WILLIAM KANTER, being duly sworn, deposes and says:

That on November 8th, 1967, he caused three copies of the regoing brief for appellee to be served by air mail, postage epaid, upon counsel for appellant:

Charles E. Cates, Esquire
1106 Arizona Title Building
Phoenix, Arizona 85003

William Kanter
WILLIAM KANTER
Attorney,
Department of Justice,
Washington, D.C. 20530.

bscribed and Sworn to before
this 8th day of November,
57.

eal]

Evelina Johnson
NOTARY PUBLIC

Commission expires April 14, 1972.

No. 22197

In the

United States Court of Appeals

For the Ninth Circuit

CASCADE EMPLOYERS' ASSOCIATION, INC., CORVALLIS SAND & GRAVEL CO., EUGENE SAND & GRAVEL CO., and WILDISH SAND & GRAVEL CO.,
Petitioners,

vs.

NATIONAL LABOR RELATIONS BOARD,
Respondent,

and

HOISTING AND PORTABLE ENGINEERS, LOCAL UNION NO. 701,
Intervenor.

PETITIONERS' REPLY BRIEF

On Petition to Review Decision and Order of the National Labor Relations Board

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DAILY JOURNAL OF COMMERCE

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TABLE OF CASES

OTHER AUTHORITIES

No. 22197

In the

United States Court of Appeals

For the Ninth Circuit

CASCADE EMPLOYERS' ASSOCIATION, INC., CORVALLIS SAND & GRAVEL CO., EUGENE SAND & GRAVEL CO., and WILDISH SAND & GRAVEL CO.,

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On Petition to Review Decision and Order of the National Labor Relations Board

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PETITIONERS' REPLY BRIEF

REPLY TO BRIEF OF NATIONAL LABOR RELATIONS BOARD

1. The Board concedes that petitioners may have suffered loss by reason of its failure to consider a restitution order (Bd Br 13), i.e., the Board not only could, but very possibly would have granted part or all of the requested relief. It does not deny that at the time the case was pending before it, the Board had *never* allowed restitution against a party to an unfair labor practice proceeding of sums paid to others under an illegally-co-

erced collective bargaining agreement. Nor is it denied that prior to the decision of the Oregon Supreme Court and the filing of the Board's memorandum in the United States Supreme Court in the *Sand & Gravel* case, it had *never* been contended by the Board or held by any court that claims against independent third persons who are not subject to the Board's jurisdiction are pre-empted by the Act. Finally, the Board ignores the position of this case: Petitioners do not seek from this Court an adjudication of the merits of their claim, but ask only that the case be remanded for the Board's consideration.

2. The Board argues only that, despite these things, petitioners' failure to seek restitution from the Union in the unfair labor practice proceedings was a mere "litigation error" and that petitioners are barred by § 10(e) of the Act. Using hindsight, it asserts that the scope of the Board's remedial authority to award such relief was foreseeable (although not established) in 1960 and that extensive limitations on the enforcement of private rights which have developed in recent years were foreshadowed by the holding in the second *Garmon* decision (*San Diego Bldg. Trades Council v. Garmon*, (1959) 359 US 236) that a state court cannot award tort damages for conduct arguably constituting an unfair labor practice which the Board could "restrain though it could not compensate" (359 US 236 at 246). *Garmon* did not, however, suggest that restitution from the union was

an available remedy from the Board, and *International Asso. Machinists v. Gonzales*, (1958) 356 US 617 at 621 had held that state remedies for breach of contract could be pursued in cases where relief from the Board would be unavailable.

Nor did *Garmon* suggest that pre-emption extends to claims against persons who are not subject to the Board's jurisdiction. The subsequent expansion of the Board's exclusive jurisdiction over cases seeking restitution from independent third persons who have no beneficial interest in sums paid them under a voided contract, was not foreseeable.

3. Decisions cited by the Board are not in point, and the asserted administrative "chaos" which the Board fears would result from allowing the present motion has not been established. This is not a case in which a party seeks to resurrect long-dead litigation by reason of an intervening decision in an unrelated lawsuit, e.g., *National Labor Rel. Bd. v. Pinkerton's Nat. Det. Agency*, (CA 9 1953) 202 F2d 230; *Wheeler v. N.L.R.B.*, (CA DC 1967) 382 F2d 172. Nor is it like *United States v. L. A. Tucker Truck Lines*, (1952) 344 US 33, in which there was no claim of any actual prejudice or injury resulting from the administrative procedural irregularity which was in question (see 344 US at 35-36).

We have shown, contrary to the Board's contention, that considerations of common fairness are not imma-

terial under § 10(e), and that subsequent decisions — even in unrelated cases — can constitute "extraordinary circumstances" (Pet Br 13-15). But that is not this case, in which the intervening legal developments have taken place between the same parties, involve the same subject matter and were, in effect, an extension of the same Board proceeding which is now before the Court.

Indeed, the Board argued to the United States Supreme Court that petitioners merely sought to remedy the unfair labor practice which had been the subject of the Board proceeding. Only the forum was different. A rule which recognizes the impact of new and unanticipated rules of administrative jurisdiction *which occur in the same case* will not create "chaos" in administrative procedures.

Under the best of circumstances, the shifting and uncertain doctrine of pre-emption results in great hardship and destroys genuine, albeit state-created rights. When its current scope is demonstrated only in proceedings growing out of the Board's own decision, it does not impinge on the Board's procedures to conclude that it should consider the problems which its own procedures and its newly-stated position before the Supreme Court have created.

4. This is not a case in which petitioners seek a determination of the merits of their claim from the

Court; they ask only that the Board be required to consider it. The Board misstates the holding in *N.L.R.B. v. Glass*, (CA 6 1963) 317 F2d 726 (Bd Br 13). In that case, the Board resisted a motion to remand on two grounds: That the employer could present its evidence of embezzlement in subsequent contempt proceedings, and that the case could not be remanded because the employer had filed no exceptions at all to the examiner's report. The question, therefore, was not whether the adjudication should be expedited; it was (1) whether the matter should be tried in the unfair labor practice proceeding or under the intimidating risks of a contempt proceeding; and (2) if the former, whether relief was barred by the employer's failure to file exceptions. The question of the court's authority under § 10(e) was therefore squarely presented, and the court disposed of it as follows:

> "Under Section 10(e) of the Act * * * we have the power to remand a case to the Board for the taking of further proofs. Our power in this respect is discretionary, * * * and *we may exercise it even though objections to the Board's order were not properly made* * * *. Under 'extraordinary circumstances' we may remand a case to the Board even though no exceptions were taken to the Intermediate Report. * * *" (317 F2d at 727; emphasis supplied)

5. The Board has inadvertently erred (Bd Br 1) in stating the history of this case. The state court actions

were commenced on March 23, 1964, not June 8, 1965, which was the date on which the second amended complaint was filed.

6. The Board suggests (Bd Br 8-9, fn 4) that an exception as to the remedy was required upon the second appeal to the Board, even though that question was not within the scope of the issues at that time. It ignores *N.L.R.B. v. Richards*, (CA 3 1959) 265 F2d 855 at 862, in which the Court held that "procedural fairness" requires that § 10(e) not apply in such a case.

REPLY TO BRIEF OF INTERVENOR HOISTING AND PORTABLE ENGINEERS LOCAL NO. 701

The Union has adopted the Board's position and contends, in addition, that the "findings and conclusions" and judgment of the Oregon Supreme Court are *res judicata* of petitioners' claims against the Union which they seek ultimately to pursue before the Board.

The contention is without merit. The Union concedes that the Oregon court decided only that the state court lacked jurisdiction of the subject matter because the actions were pre-empted by LMRA (Union Br 3). A dismissal for lack of jurisdiction is not *res judicata* in a later proceeding on the same claim in a forum which

has jurisdiction. *Costello v. United States*, (1961) 365 US 265 at 284-287 and cases there cited.

Tyler Gas Service Company v. Federal Power Com'n, (CA DC 1957) 247 F2d 590 at 594, cert den (1957) 355 US 895 was a proceeding to review an order of the Federal Power Commission. While proceedings were pending before the Commission, the petitioners, a gas company and the city with which it had a service agreement, sued to restrain their supplier from increasing its rates and for a declaratory judgment that their contracts were valid. The district court refused to issue a preliminary injunction and dismissed the complaint, on the ground that it lacked jurisdiction to grant equitable relief as to matters pending before the Commission. The Court of Appeals affirmed. Thereafter, petitioners moved before the Commission for a refund of certain sums which had been paid to the supplier during the course of the proceeding. The motion was denied, on the ground that the district court's decision was *res judicata*. The Court of Appeals reversed, saying:

> "* * * A decision dismissing a complaint for lack of jurisdiction cannot be *res judicata* as to the substantive merits of the complaint. * * *
>
> * * * * * *
>
> "We cannot see how a decision that a party must seek relief before an administrative agency can be *res judicata* of the merits of the agency's later denial of the relief requested." (247 F2d at 594)

See also Anno: 49 ALR 2d 1036 (1956).

It has twice been held that the decision of a state court that a claim is within the exclusive jurisdiction of the National Labor Relations Board is not *res judicata*, even of the jurisdictional question, in a subsequent action on the same claim in federal court. *Kipbea Baking Co. v. Strauss*, (DC ED NY 1963) 218 F Supp 696; *Thommen v. Consolidated Freightways*, (DC Or 1964) 234 F Supp 472; see also *Thomas v. Consolidation Coal Company*, (CA 4 1967) 380 F2d 69 at 84-85.

Finally, in *N.L.R.B. v. Denver Bldg. & Const. T. Council*, (1951) 341 US 675 at 681-683 the Court held that *res judicata* did not prevent the Board from deciding whether conduct charged to be an unfair labor practice affected interstate commerce, after a district court had dismissed a petition for injunctive relief under § 10(l) on the ground that it did not. The Court held that the "scheme of the statute" required that the jurisdictional decision of the Court should not foreclose the agency from making its own determination of the question.

Consequently, the decision of the Oregon Supreme Court that the subject matter of the actions was within the exclusive jurisdiction of the Board does not foreclose petitioners' right to restitution in a proceeding before the Board.

Similarly, the incidental remarks of the Oregon court about the proper interpretation of the Board's order (Union Br 2-3) are not binding in subsequent proceedings. Whether restitution from the Union will promote compliance with the Act and the national labor policy is for the Board to decide, not the Supreme Court of Oregon, whose observations were unnecessary and were merely collateral to the court's limited jurisdictional decision. Indeed, it follows from the view that those actions were pre-empted that the Oregon court could not decide the meaning of the Board's order. See *Murray v. Pocatello*, (1912) 226 US 318 at 323-324:

> "* * * Of course, if the court was not empowered to grant the relief whatever the merits might be, it could not decide what the merits were. * * *" (226 US at 324)

See also *Werner v. United States*, (CA 9 1952) 198 F2d 882 at 883; Restatement of Judgments § 49.

CONCLUSION

The petition should be granted, and the case should be remanded to the Board to consider petitioners' claim for restitution of sums paid to the trustees of the health and welfare and pension trust funds and to employees of the petitioning companies under the coerced labor agreements.

The Union's contention that issues which will be before the Board if the case is remanded are foreclosed by the decision of the Oregon Supreme Court, which held only that they must be decided by the Board, is erroneous.

Respectfully submitted,

McCOLLOCH, DEZENDORF
& SPEARS
JAMES H. CLARKE
LEWIS K. SCOTT

Attorneys for Petitioners

CERTIFICATE

I certify that, in connection with the preparation of the foregoing brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

_____

Attorney

No. 21,898

In The

UNITED STATES COURT OF APPEALS

For the Ninth Circuit

WILLIAM S. BENNETT, Appellant, -vs- FEDERAL DEPOSIT INSURANCE CORPORATION, as Receiver of SAN FRANCISCO NATIONAL BANK, Appellee.	)

APPELLANT's OPENING BRIEF

JAMES MARTIN MacINNIS
905 California Street, Suite 202
San Francisco, California 94108
Telephone: YUkon 2-4122

Attorney for Appellant

No. 21,898

In The

UNITED STATES COURT OF APPEALS

For the Ninth Circuit

WILLIAM S. BENNETT, Appellant, -vs- FEDERAL DEPOSIT INSURANCE CORPORATION, as Receiver of SAN FRANCISCO NATIONAL BANK, Appellee.	)

APPELLANT's OPENING BRIEF

JAMES MARTIN MacINNIS
905 California Street, Suite 202
San Francisco, California 94108
Telephone: YUkon 2-4122

Attorney for Appellant

This appeal has been taken from an order of the Unite
ttes District Court for the Northern District of California,
cthern Division thereof, denying a motion for relief from a
smmary) judgment pursuant to Federal Rules of Civil Procedure
(b) as entered on January 6, 1967.

THE NATURE OF THE CASE

The FEDERAL DEPOSIT INSURANCE CORPORATION as Receiver
f SAN FRANCISCO NATIONAL BANK obtained a summary judgment
ginst the present appellant, WILLIAM S. BENNETT, having
leged in a complaint that he was liable upon a "Continuing
aranty" for money advanced to others. A summary judgment was
ered against WILLIAM S. BENNETT for $405,430.00 with interest,
pn a declaration that, inter alia, "the records of SAN
NCISCO NATIONAL BANK showed that" WILLIAM S. BENNETT executed
l delivered his Continuing Guaranty upon the obligations in
estion. The existence of the obligation was denied by BENNETT
l the granting of the motion for summary judgment by the court
ok place at a time when the present appellant, believing
nself to be in the course of negotiation with FEDERAL DEPOSIT
SURANCE CORPORATION upon numerous controversies, took no action
respect of such pending motion.

THE FACTS

The plaintiff's complaint charged that the appellant NETT was liable as a continuing guarantor for monies advanced, marily to one E. T. KOMSTHOEFT. The case was one of a number similar cases filed by the same plaintiff against BENNETT, had obtained continuances for the filing of pleadings, etc. ause of negotiations in which BENNETT had offered to attempt make available to the plaintiff the discovery of assets of various debtors. These negotiations were based upon respondence which followed numerous conferences with counsel resenting the plaintiff.

The first of such letters, the contents of which are f-explanatory, was written August 23, 1966, and reads as lows:

> Thomas B. Swartz, Esquire
> Bronson, Bronson & McKinnon
> Attorneys at Law
> 255 California Street
> San Francisco, California
>
> Dear Mr. Swartz:
>
> I am sending you this letter in duplicate so that a copy may be transmitted to Federal Deposit Insurance Corporation for review in respect of its contents; it is in furtherance of the matters discussed at a conference of August 11, 1966, in which you, I, and William S. Bennett were the participants.
>
> Mr. Bennett strongly believes that he can be of substantial assistance to FDIC in its collection of monies from debtors out of assets not known to your principal, but discoverable by him. At the same time, since FDIC has made so many claims, followed by law suits, etc., against Bennett, he would hope to gain

some advantage both as to time and to potential amount in exchange for the benefit which he might thus bring to FDIC.

While we had discussed various formulae out of which these thoughts could be crystallized, you had proposed that a letter would offer a better vehicle for evaluation between you and the representative of FDIC.

Therefore, on behalf of William S. Bennett, I propose the following:

1. William S. Bennett will render active and diligent assistance to FDIC in the matter of collecting debts against borrowers of SFNB whose assets are known or discoverable by him, particularly those borrowers as to whom Bennett had originally received security.

2. Bennett would expect to receive, against asserted obligations of FDIC against him, some pro-rata credit out of any collection of money or assets which FDIC makes as a result of his efforts, or of information furnished by him; it had been suggested that for every dollar FDIC collects (either in money or assets), under such circumstances, half of such amount would be credited as an allowance against FDIC's claims against Bennett with this further proviso: Bennett would have the right to allocate such credit against a particular claim or claims of his own choosing, since there is a divergence of opinion as to the extent of Bennett's liability to FDIC.

3. In the meantime, a moratorium would be in substantial effect as between FDIC and Bennett; FDIC would not press any existing claims to trial against him and would defer or otherwise drop from any court calendar any pending motions for summary judgment, or the equivalent, involving Bennett and would not require, until receipt of further notification, the filing of any further pleadings in any of the pending actions. Similarly, Bennett would grant to FDIC an extension of the statute of limitations in relation to any claim now in the possession of FDIC against him but not as yet documented by the filing of a lawsuit with the same force and effect as though the applicable statute of limitations would thus relate to the

date of this writing.

Hoping that your views are in accord with the foregoing, believe me to be,

Yours very truly,

JAMES MARTIN MacINNIS

APPROVED:

WILLIAM S. BENNETT

Following the same, the counsel for BENNETT wrote a letter dated September 21, 1966, reading as follows:

Thomas B. Swartz, Esquire
Bronson, Bronson & McKinnon
Attorneys at Law
255 California Street
San Francisco, California

Dear Tom:

I have received other motions for summary judgments with copies of proposed orders from other members of your office in matters involving William S. Bennett. The number of files, claims and motions stemming from these matters is so overwhelming that I cannot segregate one from the other without a considerable expenditure of time and effort.

I hope that, while your client, FDIC, is considering the proposal I forwarded you recently regarding a moratorium, no adverse action respecting Mr. Bennett will be finalized.

I continue to be hopeful that Bennett's cooperation will be of sufficient practical value to permit realization of our plan.

Thanking you again for your courtesy, believe me to be,

Yours very truly,

JAMES MARTIN MacINNIS

On October 5, 1966, the counsel for plaintiff wrote the following letter:

James Martin MacInnis, Esq.
901 California Street, Suite 202
San Francisco, California 94108

Dear Jim:

Re: William S. Bennett (26-1)

I have forwarded to and discussed with the FDIC, the proposal which you and William S. Bennett have made for a moratorium with respect to litigation and other collection matters in return for certain services to be rendered by Mr. Bennett. I have been instructed by the FDIC to advise you that such a proposal is not acceptable to it and that they are continuing to pursue such collection remedies as it deems necessary to effect a maximum recovery for the Receivership, including those against Mr. Bennett.

While I appreciate your problem and the apparent good intentions of Mr. Bennett, I am nevertheless bound by the FDIC.

You may be assured, however, that we will not take the default of Mr. Bennett in any proceeding without first having given him notice and adequate time to respond. We will continue to route all these through your office until instructed otherwise.

Yours very truly,

THOMAS B. SWARTZ

In the meantime, and prior to October 5, 1966, the

plaintiff had been ordered by the court below, the late HONORABLE WILLIAM C. MATHES presiding, to prosecute motions for summary judgment in a great number of cases of similar import, all of which were pending before the same judge, for the purpose of expediting the multiplicity of lawsuits then existing.

In other cases involving similar subject matters, BENNETT had maintained that a number of alleged Continuing Guaranties bearing his signature were, in fact, spurious, and were documents relating to other obligations which had been improperly supplemented by material relating to specific substantial loans outside the knowledge of BENNETT; in a criminal action in the court below entitled UNITED STATES OF AMERICA v. SILVERTHORNE and BENNETT, No. 40467 therein, BENNETT successfully, in relation to numerous counts of the Indictment, established this contention as being the fact; of a sheaf of so-called "Continuing Guaranties", bearing BENNETT's signature, all but a solitary few contain material inserted by SILVERTHORNE without BENNETT's knowledge or consent.

Additionally, and more importantly, there had been introduced into evidence in the same criminal case a document executed by a Vice-President of the now defunct SAN FRANCISCO NATIONAL BANK, purporting to release BENNETT from all of such obligations. This document reads as follows:

Jan. 7, 1965

Mr. Art Atherton
San Francisco National Bank
260 California Street
San Francisco, California

Dear Mr. Atherton:

As per your request, I am enclosing herewith, the original Title Policy in the amount of $170,000.00 insuring the undersigned on the Novak, McNutt transaction in Marin County, five various letters of correspondence between the title companies and the undersigned, in reference to the Novak deals, and six original recorded trust deeds in favor of the undersigned, signed by Novak, with an assignment of each of the trust deeds from the undersigned to the San Francisco National Bank.

You further requested that I assign over to the San Francisco National Bank the $550,000.00 Trust Deed which Mr. McNutt caused to be recorded in favor of the undersigned. This assignment is enclosed herewith also, with the understanding that upon assigning the trust deeds over to San Francisco National Bank and turning over of my files and records to the bank, the undersigned William S. Bennett is to be relieved of any and all liability, past or future, in connection with these loans or any of the loans where security was taken and assigned to the bank.

You also requested assignments on the Claitor properties, but since I previously turned over my files to the bank on the Claitor loans, I am unable to prepare the assignments; however I will sign the assignments if you have them prepared and I will assign them to the bank based on the same agreement as the above stated.

Thank you. Please sign acknowledgment and receipt of this letter and documents.

Sincerely,

WILLIAM S. BENNETT

s/ ARTHUR ATHERTON
SAN FRANCISCO NATIONAL BANK
1-7-65
DATE

Copies of the document last above mentioned have been filed (over objection) as separate defenses in the court below in numerous of the other cases upon alleged Continuing Guaranties which have not yet been brought to trial.

BENNETT possessed a sufficient defense to the plaintiff's complaint had he been allowed to present it.

It is respectfully prayed that the circumstances shown by the correspondence alone (all of which were filed with the court below), when added to the fact of the enormity of the existing judgment, should have impelled the court below to grant BENNETT the relief sought.

To saddle him with an obligation so well in excess of $400,000.00 would thus seem to fit the cliche of an "abuse of discretion".

It is hence respectfully requested that the summary judgment of the court below be set aside and that the appellant be permitted to present his defense upon a trial.

DATED: October 27, 1967.

Respectfully submitted,

JAMES MARTIN MacINNIS
Attorney for Appellant

I certify that, in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

JAMES MARTIN MacINNIS
Attorney for Appellant

No. 21898

In the

United States Court of Appeals

For the Ninth Circuit

WILLIAM S. BENNETT,	*Appellant,*
vs.	
FEDERAL DEPOSIT INSURANCE CORPORATION, as receiver of San Francisco National Bank,	*Appellee.*

Brief of Appellee Federal Deposit Insurance Corporation as Receiver of San Francisco National Bank

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SUBJECT INDEX

TABLE OF AUTHORITIES CITED

No. 21898

In the

United States Court of Appeals

For the Ninth Circuit

WILLIAM S. BENNETT,

Appellant,

vs.

FEDERAL DEPOSIT INSURANCE CORPORATION, as receiver of San Francisco National Bank,

Appellee.

Brief of Appellee Federal Deposit Insurance Corporation as Receiver of San Francisco National Bank

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PRELIMINARY STATEMENT

This appeal is from the order denying appellant's motion to set aside the judgment against him.

The only issue is whether the District Court abused its discretion by denying appellant's motion. We will show that there was no abuse of discretion.

The basic point is that appellant did not defend the action. Appellant was served with numerous documents throughout the more than one year of litigation in the District Court. He was represented by an attorney during

all of that time. But he did nothing about the suit until after judgment had been entered against him.

We will briefly relate the relevant facts of the litigation. We will then show that because of these facts the District Court properly exercised its discretion in denying appellant's motion to set aside the judgment. Finally, we will respond to appellant's arguments and will show that they do not establish any abuse of discretion.

JURISDICTION

The action was commenced in the United States District Court to recover assets in connection with the receivership and the winding up of the affairs of a national bank; transcript pp. 1-2. The District Court had jurisdiction under 12 U.S.C. § 1819, 28 U.S.C. § 1331, and 28 U.S.C. §§ 1345-1348.

This appeal is from the order of the District Court denying appellant's motion under Rule 60 (b) of the Federal Rules of Civil Procedure; transcript p. 108. An order denying relief under Rule 60 (b) is an appealable order, Vol. 7, Moore, Federal Practice, p. 341. This court has appellate jurisdiction over orders of the District Court; 28 U.S.C. § 1291.

FACTS

The towering fact is that appellant, although represented by an attorney, took no steps to defend this litigation. In order to demonstrate appellant's lack of concern for the action, we must briefly relate the events:

Federal Deposit Insurance Corporation is the receiver of the closed San Francisco National Bank.[1]

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1. Tr. 2. (In this brief Federal Deposit Insurance Corporation in its capacity as the receiver of the bank will simply be called "FDIC").

In August, 1965, FDIC filed its complaint against appellant and others.[2] FDIC alleged that appellant had executed continuing guaranties of the notes of the other defendants.[3] The complaint asked for judgment against appellant for the full amount of those unpaid notes.[4] The complaint was served in November, 1965.[5]

Appellant has never answered that complaint.

In July, 1966, appellant was in default. FDIC could have taken appellant's default and entered a default judgment against him. Instead, FDIC moved for summary judgment against all defendants. On July 29 it filed and served the motion and supporting documents.[6] Appellant admits that the motion for summary judgment was "duly served upon [appellant] through his counsel of record."[7]

Appellant filed no opposition to the summary judgment motion.

On September 9, 1966, the District Court entered its order granting the summary judgment.[8] This order was served on appellant on September 19, 1966.[9] On that date appellant was also served with the proposed form of judgment and an affidavit regarding the attorneys' fees which FDIC requested.

Appellant made no reply to the order, the proposed form of judgment, or the affidavit.

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2. Tr. 1.
3. Tr. 12-13, 21, 22.
4. Tr. 13-14.
5. Tr. 115.
6. Tr. 37-59.
7. Tr. 76-77.
8. Tr. 61-67.
9. Tr. 60.

Judgment was filed on September 28, 1966.[10] Notice was served upon appellant on October 14, 1966.[11]

Appellant did not then attack the judgment. And he has never appealed from it.

FDIC then filed and served its cost bill against appellant on October 21, 1966.[12]

Appellant took no action after receiving the cost bill.

On October 31, 1966, the District Court ordered appellant to appear and answer concerning his property.[13] This was served on appellant on November 7. The hearing was set for November 28.

On November 22 appellant filed his motion for relief from the judgment.[14] On the same date appellant obtained an ex parte order staying the hearing which had been set for the 28th of November.[15] These documents were the *first* papers he ever filed in this action. That first filing was over one year after the case began, was nearly two months after the entry of judgment, and was just six days before the scheduled property hearing.

After briefing, the District Court denied appellant's motion to set aside the judgment.[16]

Appellant appeals from this denial.[17] We will show that the District Court's denial was a proper exercise of its discretion.

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10. Tr. 68.
11. Tr. 116.
12. Tr. 69-70.
13. Tr. 73-74.
14. Tr. 76.
15. Tr. 85.
16. Tr. 102.
17. Tr. 108.

THE ORDER OF THE DISTRICT COURT CANNOT BE REVERSED EXCEPT FOR AN ABUSE OF DISCRETION

Appellant did not appeal from the judgment. Rather, he attacked the judgment under Rule 60(b) of the Federal Rules of Civil Procedure.[18] He did so on the ground of inadvertence and excusable neglect.[19] The law is clear that a motion under Rule 60(b) is directed to the *discretion* of the District Court. Discretion is particularly important here, because the asserted ground for attacking the judgment was not a legal matter, but a factual matter (i.e., inadvertence and excusable neglect). The District Court's exercise of discretion cannot be reversed except for an abuse of that discretion.

This Court has frequently stated that the District Court's denial of relief from a judgment will not be reversed unless there is an abuse of discretion.

For example, in *Siberell v. United States,* 268 F.2d 61 (9th Cir. 1959), a motion to vacate a portion of the judgment in the District Court was denied. The denial was affirmed on appeal by this Court, stating on page 62:

> "It is well settled that a motion to vacate a judgment is addressed to the sound legal discretion of the trial court, and its determination will not be disturbed except for an abuse of discretion."

Accord, *Kolstad v. United States,* 262 F.2d 839 (9th Cir. 1959); *Independence Lead Mines Company v. Kingsbury,* 175 F.2d 983 (9th Cir. 1949); *Stafford v. Russell,* 220 F.2d 853 (9th Cir. 1955); *Perrin v. Aluminum Company of America,* 197 F.2d 254 (9th Cir. 1952); *Cole v. Fairview Development,* 226 F.2d 175 (9th Cir. 1955).

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18. Tr. 76.
19. Tr. 76-77.

In *Smith v. Stone,* 308 F.2d 15 (9th Cir. 1962), this Court considered proceedings similar to the present case. Appellant had failed to oppose a summary judgment which was entered against him. The District Court then denied appellant's motion under Rule 60(b) to set aside the judgment on the ground of inadvertence. The denial was affirmed on appeal, and this Court again stated its support for the discretionary power of the District Court. Because of its appropriateness to this appeal, we will quote the opinion extensively (pages 17-18):

> "We consider then, as the only matter before us, the refusal of the trial court to set aside the final judgment. We are met with the general rule, agreed to by appellant that whether there exists a sufficient showing of inadevertence or excusable neglect *is purely a matter of discretion with the trial court* . . .
>
> "The court below properly, in the exercise of its *judicial discretion,* granted the [summary judgment] motions before it. There was no opposition, either in writing or orally to the facts presented by appellees. Counsel for litigants, no matter how 'important' their cases are, cannot themselves decide when they wish to appear, or when they will file those papers required in a lawsuit. Chaos would result . . .
>
> "Finding no error, we do not reach a consideration of the merits of appellant's claim. *We find no abuse of discretion in the trial court's refusal to reopen.*" (Emphasis added)

THERE WAS NO ABUSE OF DISCRETION

The District Court correctly exercised its discretion in denying appellant's motion to attack the judgment.

The discretion was properly exercised because appellant had taken no steps to defend this litigation until after judgment was entered:

Appellant has never answered the complaint.

Appellant filed no opposition to the motion for summary judgment.

Appellant made no response to the order granting the summary judgment.

Appellant made no reply to the proposed form of judgment or to the affidavit for attorneys' fees.

Appellant made no response to the notice of the judgment.

Appellant made no response to the cost bill.

And appellant filed no appeal from the judgment.

Not until just six days before the scheduled property examination did appellant file his first piece of paper in this suit. This was over one year after the action had been pending against him, and nearly two months after the judgment.

Throughout the course of the litigation appellant simply ignored all of the process served upon him.

The District Court was within its discretion in denying appellant's attack on the judgment when appellant had so completely ignored the litigation. The language of this Court in *Smith v. Stone* is particularly appropriate (page 18):

> "The court below properly, in the exercise of its judicial discretion, granted the [summary judgment] motions before it. There was no opposition, either in writing or orally, to the facts presented by appellees. Counsel for litigants, no matter how 'important' their cases are, cannot themselves decide when they wish to appear, or when they will file those papers required in a lawsuit. Chaos would result."

APPELLANT HAS SHOWN NO ABUSE OF DISCRETION

We will now reply to appellant's asserted reasons for attacking the judgment. We will show that they are not

sufficient to set the judgment aside, much less to show an abuse of discretion in refusing to set it aside.

Appellant argues that there is an abuse of discretion because of the large size of the judgment.[20] The size of the judgment should come as no surprise to appellant. He signed continuing guaranties in those amounts.[21] The complaint and the prayer against him asked for judgment in that amount.[22] And the motion for summary judgment asked for judgment against him in that amount.[23] If appellant were concerned by the sum involved, he should have expressed his concern by defending the case, not by complaining after the judgment was entered. In *Smith v. Stone* this Court rejected counsel's argument that because of the importance of the case he should be excused for his failure to oppose the summary judgment motion. As the Court stated (page 18):

> "Counsel for appellant then states because this is an important case, he should be excused for his failure to file opposition to the motion to dismiss, and for summary judgment . . .
>
> "Counsel for litigants no matter how 'important' their cases are, cannot themselves decide when they wish to appear, or when they will file those papers required in a lawsuit. Chaos would result."

Appellant argues that there is an abuse of discretion because he has a "sufficient defense."[24] The defense which appellant would assert is apparently the statements made in the last two paragraphs on page 7 of his brief and the letter on page 8.

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20. Appellant's brief, page 9.
21. Tr. 21, 22, 52, 53.
22. Tr. 12-14.
23. Tr. 37-59.
24. Appellant's brief, page 9.

FDIC denies that those matters would constitute a defense. But there is no need to burden the Court with a discussion. The reason is that this "defense" was not presented to the District Court in this case. It was not presented in any answer to the complaint or to the summary judgment motion, and it was not presented in appellant's motion to set aside the judgment.

In this regard we disagree with two statements made by appellant. On page 2 of his brief, appellant states: "The existence of the obligation was denied by Bennett . . ." And on page 9 appellant says that the correspondence was filed with the court below. Appellant errs. He filed no answer to the complaint. And he made no opposition to the motion for summary judgment. And in his motion to set aside the judgment there is nothing denying the obligation and no filing of the alleged letter on page 8 of appellant's brief.[25] These matters are being raised in this case for the first time in this appeal. They were not presented to the District Court.

On page 7 of his brief appellant makes an argument based on other cases in which appellant is engaged. An alleged defense in another case is not relevant to this case. The simple answer is that if appellant thought that his defense in the other case were valid here, he should have asserted it either by answer or by opposition to the summary judgment motion. Again, as stated by this Court in *Smith v. Stone* (page 18):

> "Counsel for appellant here urges, as he urged below in his motion to set aside, that he has a good case but that the court below believes there is no merit in the case. He also urges that in other cases he has proved right by a victory in the Supreme Court, after trial judges had no faith in his position. Neither argument

25. Tr. 75-86.

aids his position here. Neither fact, if true, excuses his failure to follow ordinary court procedures and rules in this case."

Finally, we must consider appellant's argument to the District Court. His motion was based upon inadvertence. The inadvertence involved the state of mind of appellant's counsel.[26] And in turn, that state of mind pertained to an alleged agreement for a moratorium. In this appeal, appellant has made no direct reference to inadvertence or state of mind. However, because his brief cites certain correspondence on which he argued his alleged state of mind to the District Court, FDIC feels compelled to reply.

The issues of alleged agreement, state of mind, and inadvertence were matters of fact for the District Court. The Dictrict Court ruled against appellant. And there is substantial evidence to support this ruling by the District Court. An affidavit was filed by the attorneys for FDIC in opposition to appellant's motion. The affidavit stated specifically:[27]

> "there was no assurance given by the undersigned to William S. Bennett or to James Martin MacInnis, his attorney, that pending actions with appropriate notice would not be prosecuted against William S. Bennett . . ."

Since this affidavit is in the record and since the District Court ruled on this matter of fact against appellant, appellant cannot show any abuse of discretion.

Even further, appellant's own correspondence shows that there was no agreement. The letter of August 23, 1966[28] is

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26. Tr. 76-79.

27. Tr. 99, lines 27-30.

28. Tr. 81.

not an agreement. It is simply an offer by appellant for an agreement. And the offer was never accepted by FDIC. Such a unilateral offer certainly cannot bind FDIC. Further, it should be noted that this letter was not sent until almost a month after the motion for summary judgment had been served upon appellant. But the letter made no reference to the motion for summary judgment. Nor was any oral reference made to the pending summary judgment motion. As stated in FDIC's affidavit:[29]

> "at the time of the meeting with Mr. William S. Bennett and James Martin MacInnis on August 11, 1966, with reference to the proposed moratorium, no mention was made by Messrs. Bennett and MacInnis with reference to the pending motion for summary judgment in the above entitled action . . ."

That affidavit[30] also states that the September 21, 1966[31] letter was received without any mention of the proceedings in this case. By that date appellant had already been served with the order granting the summary judgment, the proposed form of judgment, and the affidavit for attorneys' fees.

Nothing in appellant's letters would relieve him of his usual obligation to appear in response to process served upon him.

At most, FDIC simply advised appellant that it:[32]

> "will not take the default of Mr. Bennett in any proceedings without first having given him notice and adequate time to respond. We will continue to route all these through your office until instructed otherwise."

---

29. Tr. 99, lines 6-11.
30. Tr. 99, lines 16-19.
31. Tr. 83.
32. Tr. 84, 98, line 30, to 99, line 2.

The record shows that FDIC gave appellant notice of every step of the proceedings, and gave him more than adequate time to respond. All motion documents went to the office of appellant's counsel.

FDIC's affidavit and appellant's own letters demonstrate that there was no agreement not to prosecute this action against appellant. And both the record and the case law demonstrate that appellant's inadvertence or state of mind does not justify setting aside the judgment.

CONCLUSION

The only issue before this Court is abuse of discretion. The question is not whether this Court, had it been sitting as the District Court, would have set aside the judgment. The only question is whether the District Court abused its discretion in not doing so. Therefore, if there is any basis for supporting the District Court's conclusion, that conclusion must be affirmed.

For over one year appellant took no action to defend the case, although he was represented by counsel. He did not answer the complaint and did not oppose the summary judgment motion. Appellant's consistent ignoring of all process served upon him supports the District Court's exercise of its discretion. With a record of such repeated failures to defend himself, appellant cannot show any basis for setting aside the judgment, much less show an abuse of discretion in not doing so.

It is respectfully submitted that the order of the District Court should be affirmed.

Dated: December 29, 1967.

CHARLES A. LEGGE
JOHN H. SEARS
BRONSON, BRONSON & MCKINNON
255 California Street
San Francisco, California 94111

LESLIE H. FISHER
Deputy General Counsel
Federal Deposit Insurance Corporation

Attorneys for Appellee

CERTIFICATE OF COUNSEL

I certify that, in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

CHARLES A. LEGGE

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

WILLIAM ELLHAMER, Appellant, vs. L. E. WILSON, Warden, Appellee.	)	No. 21,899

APPELLEE'S BRIEF

THOMAS C. LYNCH, Attorney General
of the State of California

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TOPICAL INDEX

TABLE OF CASES

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

WILLIAM ELLHAMER, Appellant, vs. LAWRENCE E. WILSON, WARDEN, Appellee.	)	No. 21,899

APPELLEE'S BRIEF

JURISDICTION

The jurisdiction of the United States District Court, Northern District of California, to entertain appellant's application for a writ of habeas corpus was conferred by Title 28, United States Code, section 2241. The jurisdiction of this Court is conferred by Title 28, United States Code section 2253.

STATEMENT OF THE CASE

On February 24, 1953, appellant was convicted in the Superior Court of Los Angeles County, after trial by jury, of three counts of the offense of first degree robbery in violation of California Penal Code section 211. He was sentenced to state prison for the term prescribed by law, the sentences to run concurrently. A certified copy of this judgment and order of commitment is annexed hereto in the

Appendix as "Exhibit A".[1] On February 17, 1959, appellant's sentences were fixed at 10 years each; on September 4, 1959, he was paroled. See Summary of Sentence Data appended as "Exhibit B."

On June 8, 1961, appellant was again convicted in the Superior Court for the County of Los Angeles of robbery in violation of California Penal Code section 211. Probation was denied and appellant sentenced to the state prison for the term prescribed by law, the sentence to run consecutively with that imposed for the 1953 conviction. A copy of the 1961 judgment and order of commitment is annexed hereto in the Appendix as "Exhibit C."

On June 21, 1961, appellant was charged with violating his parole on the 1953 conviction. It was charged that he violated the conditions of his parole by committing robbery in the first degree as evidenced by the 1961 conviction. It was also charged that he violated the conditions of his

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1. "Exhibit A," together with the other exhibits in appellee's Appendix serve to explain matters which relate to appellant's present claim for relief. The Court of Appeals may take notice of these records of proceedings in the state and federal courts which relate to appellant's claim of relief. See, Lambert v. Conrad, 308 F.2d 571 (9th Cir. 1962); St. Paul Fire & Marine Insurance Co. v. Cunningham, 257 F.2d 731, 732 (9th Cir. 1958); United States ex rel. Pavloc v. Chairman of Board of Parole, 81 F.Supp. 592, 593 (W.D. Pa. 1948), aff'd on opinion below, 175 F.2d 780 (3rd Cir. 1949) [cited with approval in Stiltner v. Rhay, 322 F.2d 314, 316 n. 6 (9th Cir. 1963)].

parole by associating with other exfelons and active parolees without the specific approval of his parole agent or the Adult Parole Division. A copy of the charges filed by the Adult Parole Division are appended as "Exhibit D."

On June 30, 1961, appellant's parole was revoked and his sentence refixed at maximum for the reasons contained in the charges brought by the Adult Parole Division. A certification of the Adult Authority action and the minutes of the June 30th are annexed in the Appendix as EXHIBITS "E" and "F" respectively. He appealed the 1961 conviction to the California District Court of Appeal, Second Appellate District, Division Four, which affirmed the conviction on February 1, 1962. People v. Ellhamer, 199 Cal.App.2d 777 (1962); 18 Cal.Rptr. 905 (1962).

On July 31, 1963, a petition for a writ of habeas corpus was filed in the California Supreme Court and was denied on October 1, 1963. In re Ellhamer, Crim. No. 7478. On March 5, 1964, a second petition for writ of habeas corpus was filed in the California Supreme Court. This petition was denied on April 15, 1964. In re Ellhamer, Crim. No. 7803.

On August 27, 1964, appellant's application for habeas corpus, which attacked the 1961 conviction, was denied by the United States District Court for the Northern District of California, No. 42326. In denying the petition, the Court determined that, as appellant was properly imprisoned under

one valid state conviction, he could not question the validity of another state conviction and cited McNally v. Hill, 293 U.S. 131, 55 S.Ct. 24, 79 L.Ed. 238 (1934).

A petition for rehearing on the matter was denied September 24, 1964. Notice of Appeal was filed on October 9, 1964. On January 9, 1965, this Court in Misc. 2162, treated the notice as an application for a certificate of probable cause for appeal and denied it as premature. When appellant applied to the District Court for a certificate of probable cause, the application was denied on January 26, 1965, because the time for filing had expired. On March 3, 1965, this Court denied petitioner's application for a certificate of probable cause on the same basis as the original denial of the petition in the District Court. A petition for writ of habeas corpus filed with the United States Supreme Court was treated as a petition for writ of certiorari and denied October 18, 1965. Misc. 256, October Term, 1965.

An application for writ of habeas corpus filed with the Superior Court of Marin County was denied on July 21, 1966. In re Ellhamer, No. 46113. On September 11, 1966, appellant filed a petition for writ of habeas corpus in the United States District Court for the Northern District of California. The petition, in an action numbered 45532, was denied on December 7, 1966.

The petition for writ of habeas corpus which is

the subject of this action was filed in the United States District Court, Northern District of California, on or about April 10, 1967 and numbered 46545. On April 6, 1967, the petition was denied on the ground that the court lacked jurisdiction under the doctrine of McNally v. Hill, 293 U.S. 131, 55 S.Ct. 24, 79 L.Ed. 238 (1934). In the order denying the writ of habeas corpus, the District Court noted that in light of Martin v. Commonwealth of Virginia, 349 F.2d 781 (4th Cir. 1965) and Arketa v. Wilson, 373 F.2d 582 (9th Cir. 1967), appellant's contention that McNally did not deprive the court of jurisdiction, had possible merit.

Appellant filed notice of appeal and applied for a certificate of probable cause and leave to appeal in forma pauperis. A certificate of probable cause and leave to appeal in forma pauperis were issued by the District Court on April 27, 1967.

ARGUMENT

AS APPELLANT IS IN CUSTODY PURSUANT TO CONVICTIONS WHICH HE HAS NOT ATTACKED, THE DISTRICT COURT WAS WITHOUT JURISDICTION TO CONSIDER HIS ATTACK ON A SUBSEQUENT CONVICTION.

While on parole for convictions in 1953, the terms for which had been set at 10 years, appellant suffered a subsequent conviction. An Adult Authority hearing was held to consider charges that appellant had violated the conditions of his parole, which was revoked and the terms on the 1953

convictions refixed at an indeterminate life sentence.

Appellant's sole contention is that, in light of recent decisions which have re-interpreted McNally v. Hill, 293 U.S. 131, 55 S.Ct. 24, 79 L.Ed. 238 (1934), the unquestioned validity of the original conviction on which parole was revoked does not deprive the District Court of jurisdiction to consider his attack upon the validity of his subsequent conviction. Appellee submits that McNally v. Hill, is controlling and that the District Court properly declined to consider the merits of appellant's petition.

One of the decisions relied upon by petitioner, Martin v. Commonwealth of Virginia, 349 F.2d 781 (4th Cir. 1965) holds that when a conviction results in a petitioner's ineligibility for parole on a prior conviction, habeas corpus is available to attack the validity of the subsequent sentence. This holding is contrary to McNally v. Hill, which holds that habeas corpus is available to attack a sentence presently being served only when the court can order a release from custody. The theory of Martin is that a prisoner is sufficiently "in custody" under the subsequent sentence to satisfy the statutory language of 28 United States Code section 2241 when that sentence has the effect of denying him eligibility for parole. Martin v. Commonwealth of Virginia, 349 F.2d 781, 783 (4th Cir. 1965).

In Martin, the Fourth Circuit noted the express holding of McNally v. Hill, 239 U.S. 131, 55 S.Ct. 24, 79 L.Ed. 238 (1934) that a sentence which the prisoner had not begun to serve did not satisfy the requirement of "custody" even though a result of the challenged sentence was to thwart his eligibility for parole, then held to the contrary. The rationale for the court's refusal to follow McNally was that the rule had been so eroded by subsequent decisions of the Supreme Court that it no longer represented the opinion of that Court. Martin justified the deviation in part on Jones v. Cunningham, 371 U.S. 236, 83 S.Ct. 373, 9 L.Ed.2d 285 (1963) which held that parole was sufficient "custody" to grant a Federal District Court habeas corpus jurisdiction under 28 U.S.C.A. § 2241 (1959).

While this is the holding of Jones, there was no issue there involving McNally. The prisoner attacked the precise sentence which he was then serving on the ground that he had been wrongfully sentenced as a habitual offender because of an invalid prior conviction. The decision simply held that the prisoner's release on parole did not moot his application for habeas relief. Jones affords no justification for a determination that McNally presently lacks vitality. Jones merely redefines the term "custody" within the context of the proposition that a prisoner may only attack the validity of a sentence which is the basis of his present

restraint. Martin constitutes an unwarranted deviation from this proposition.

Nor is Martin justified by Fay v. Noia, 372 U.S. 391, 83 S.Ct. 822, 9 L.Ed.2d 837 (1963). Indeed, in equating "custody" with "restraint of liberty" and in noting that it was a prerequisite to habeas, the Court in Fay v. Noia reaffirmed McNally. The Court, citing McNally noted that the only remedy available on habeas is some form of discharge from custody. Fay v. Noia, supra, 372 U.S. at 427, fn. 38.

Assuming for purposes of argument that Martin is sound, it is factually distinguishable from the instant case. Appellant, as distinguished from the petitioner in Martin, does not question the validity of a conviction which has the effect of rendering him ineligible for parole. He is presently eligible for parole not withstanding the subsequent conviction which is presently in issue.

Nor are we able to ascertain the applicability of Arketa v. Wilson, 373 F.2d 582 (9th Cir. 1967) to the facts in the instant case. In Arketa this Court held that a state prisoner whose adjudication as a habitual criminal resulted in his ineligibility for probation was entitled to attack the validity of a prior conviction on federal constitutional grounds. Though probation has been equated with parole, Arketa fails to support appellant's claim of jurisdiction.

As previously noted, the conviction which appellant seeks to attack has no effect on his eligibility for parole on his admittedly valid prior conviction. In Arketa, the effect of the prior conviction attacked by petitioner was to deprive him of the right to consideration for probation and to compel a prison sentence.

The sentence for appellant's earlier conviction, the validity of which he does not attack, is now fixed at life imprisonment. but in spite of his subsequent conviction, he is eligible for parole. Since a federal determination that his subsequent conviction is invalid would not affect the lawfulness of his present state custody, the federal courts are without habeas jurisdiction. McNally v. Hill, 293 U.S. 131, 55 S.Ct. 24, 79 L.Ed.2d 238 (1934); Barquera v. People of the State of California, 374 F.2d 177 (9th Cir. 1967); Dyer v. Wilson, 363 F.2d 955 (9th Cir. 1966).

A possible basis for an exception to McNally is that established by Ex parte Hull, 312 U.S. 546, 61 S.Ct. 640; 85 L.Ed. 1034 (1941). Hull holds that McNally does not apply when probation or parole relating to a prior conviction is revoked solely on the basis of a subsequent conviction. Smith v. Wilson, 371 F.2d 681, 684 (9th Cir. 1967); Wilson v. Gray, 345 F.2d 282, 284 (9th Cir. 1965). There is, no proscription against the parole authorities' consideration of the facts relating to a subsequent offense

in determining whether parole should be revoked. In re Anderson, 107 Cal.App.2d 670, 237 P.2d 720 (1951).

The Adult Authority records indicate that the first charge of parole violation was that appellant did so by committing robbery in the first degree and the supporting evidence submitted on the report from the Adult Parole Division to the Adult Authority spells out in some detail the facts relating to a super market robbery by appellant and his accomplice.

Furthermore, it is clear from the cases which have interpreted Hull that this exception to McNally is simply that the subsequent conviction may not be the sole reason for the revocation of probation or parole under a prior conviction. It is not applicable when apart from the subsequent conviction there are other violations which also afford justification for the revocation. In Wilson v. Gray, 345 F.2d 282, 284 (9th Cir. 1965) this Court reversed a district court finding that petitioner's probation was revoked as the result of his conviction of a subsequent offense. The record from the district court indicated that in revoking probation, the sentencing court also took other matters into consideration. This Court stated:

> "The record clearly indicates that the . . . decision revoking appellee's probation was predicated upon the appellee's conduct, only a portion of which

constituted the offense of which he was charged and for which he was convicted, and not solely by reason of his conviction of that offense." Wilson v. Gray, 345 F.2d 282, 284-86 (9th Cir. 1965).

The records in the instant case evidence the bases for the revocation of appellant's parole on the prior conviction. Appellant faced two charges of violating the conditions of his parole. The first was that he violated Condititon 11 of his parole by committing robbery in the first degree as evidenced by his conviction on May 9, 1961. The second was that appellant violated Condition 8 of his parole by associating with other ex-felons and active parolees without the specific approval of his parole agent or the Adult Parole Division. See EXHIBIT "D." The minutes of the Adult Authority proceeding at which appellant's parole was revoked reflect that both charges afforded the bases for the revocation of his parole by the Adult Authority. See EXHIBIT "F" appended hereto.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the District Court correctly determined its lack of jurisdiction and that the order denying the petition

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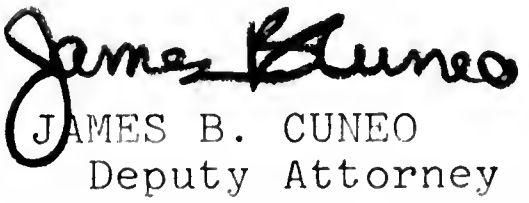
for writ of habeas corpus should be affirmed.

DATED: October 2, 1967

THOMAS C. LYNCH, Attorney General
of the State of California

DERALD E. GRANBERG
Deputy Attorney General



JAMES B. CUNEO
Deputy Attorney General

Attorneys for Appellee

JBC:cmw
CR SF
67-524

CERTIFICATE OF COUNSEL

I certify that in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit and that, in my opinion, this brief is in full compliance with these rules.

DATED: October 2, 1967

JAMES B. CUNEO
Deputy Attorney General

A P P E N D I X

C. I. M.

1953 MAR -4 PM 2:24

G.C. ADMITTANCE

DEPT. NO. LBE CASE NO. 152703

A-94428

In the Superior Court of the State of California

IN AND FOR THE COUNTY OF LOS ANGELES

ABSTRACT OF JUDGMENT
(Commitment to State Prison as provided by Penal Code Section 1213.5)

The People of the State of California,

vs.

WILLIAM ELLHAMER

Defendant.

Hon. JOSEPH M. MALTBY
(Judge of Superior Court)

Lynn Compton
Deputy (District Attorney)

Robert E Krause
(Counsel for Defendant)

This certifies that on the 24th day of February, 19 53 judgment of conviction of the above-named defendant was entered as follows:

In Case No. 152703 Count No. III, VI & IX he was convicted by Jury (Court or Jury); on his plea of not guilty (guilty, not guilty, former conviction or acquittal, once in jeopardy, not guilty by reason of insanity); of the crime of ROBBERY, first degree

(designation of crime and degree if any, including fact that it constitutes a second or subsequent conviction of same offense if that affects the sentence and if under Section 209 of the Penal Code whether victim suffered bodily harm);

in violation of Section211, Penal Code
(reference to Code or Statute, including Section and Sub-section);

with prior convictions charged [redacted] admitted second prior conviction, first prior having been found true

DATE	COUNTY AND STATE	CRIME	DISPOSITION
1/16/46	Los Angeles County California	Burglary	No disposition alleged
5/24/48	Los Angeles County California	Robbery	State Prison

THE WITHIN INSTRUMENT IS A CORRECT COPY OF THE ORIGINAL ON FILE IN THIS OFFICE.
ATTEST:

CALIFORNIA STATE PRISON AT SAN QUENTIN
BY W. C. Gillis
RECORDS OFFICER

(AFFIX SEAL)

Defendant was (was) or (was not) charged [redacted] was found to have been armed with a deadly weapon at the time of commission of the offense, [redacted] within the meaning of Penal Code Sections 969c and 3024.

EXHIBIT A

Defendant **was not** adjudged a habitual criminal within the meaning of Sub-division ____ of
(was) or (was not) (a) or (b)
Section 644 of the Penal Code; and the defendant ____ a habitual criminal in accordance with Sub-division (c)
(is) or (is not)
of that Section.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that the said defendant be punished by imprisonment in the State Prison of the State of California for the term provided by law, and that he be remanded to the Sheriff of the ____ County of LOS ANGELES and by him delivered to the Director of Corrections of the State of California at the place hereinafter designated.

It is ordered that sentences shall be served in respect to one another as follows ____
(Note whether concurrent or consecutive as to each count);

COUNTS 3, 6 and 9 are ordered to run CONCURRENTLY with each other.

and in respect to any prior incompleted sentence (s) as follows: ____
(Note whether concurrent or consecutive as to all incomplete sentences from other jurisdictions);

To the Sheriff of the ____ County of LOS ANGELES and to the Director of Corrections:

Pursuant to the aforesaid judgment, this is to command you, the said Sheriff, to deliver the above-named defendant into the custody of the Director of Corrections at **Chino.** ____
at your earliest convenience.

Witness my hand and seal of said court

this **27th** day of **February**

HAROLD J. OSTLY,

Clerk

by ____ Deputy

SEAL

State of California,
____ County of LOS ANGELES } ss.

I do hereby certify the foregoing to be a true and correct abstract of the judgment duly made and entered on the minutes of the Superior Court in the above entitled action as provided by Penal Code Section 1213.

Attest my hand and seal of the said Superior Court this **27th** day of **February** 19 **53**

HAROLD J. OSTLY.

County Clerk and Ex-officio Clerk of the Superior Court of the State of California in and for the

County of LOS ANGELES By E. Wheelham, Deputy

The Honorable JOSEPH M MALTBY

Judge of the Superior Court of the State of California, in and for the ____ County of

LOS ANGELES

NOTE: If probation was granted in any sentence of which abstract of judgment is certified, attach a minute order reciting the fact and imposing sentence or ordering a suspended sentence into effect.

SUMMARY OF SENTENCE DATA

~~WANTED~~	Credits Forfeited	Credits Restored	Additional Credits	Discharge Date	Parole Effective Date
CRIME: Robb. 2nd (211-PC)					
SENTENCE: 1-Life					
COUNTY: Los Angeles					
County Case No: 118979					
JUDGE: F. Miller (PG)					
X 6-15-48 Rec'd. at Guidance Center					
9-18-48 Trans. to San Quentin					
X 6-13-49 TFA 5 yrs. Granted last 2½ yrs. on parole.				~~6-15-53~~ ~~12-15-50~~	
X 12-15-50 Paroled-Los Angeles Dist. & Co.				1	
X JAN 2 1953 PAR. SUSPENDED TRFA ~~Mar~~					
3-4-53 SQ PV WNT Rec'd RGC, CIM at Beg.	2M2D				
3-6-53 Trans. to Folsom ~~inst~~ SQ.					
3-9-53 Rec'd SQ.				Life	
6-5-53 PD set. 6, 4 & 5 NG set. 3 & 3 FG set. 2 & 3 Rev. Denied. Class on 3/57 cal.					
~~5-21-53 Wanted. Prosecuting Attorney, Clay Co. Liberty, Mo.~~					
2-21-57 DENIED PAR To Mar 58 CAL					
2-26-58 DENIED - P.D. To 3-59 CAL					
2-17-59 TRFA - 10 YRS X FA - 10-10-10 X YRS CC & CC WOT Granted 3 YRS 6 MOS on Parole				SEE "A" TERM	
8-17-59 To Go To To HOLD				8-17-58	9-4-53
6-23-59 No longer Wanted Prosecuting Attorney, Clay Co, Liberty, Mo.				C	
7-20-59 - On dismissal of To Go To HOLD REMOVED					
9-4-59 Paroled - Long Beach-Orange Co					
6-20-61 PU VIA "B" RGC - CIM eswpr					
6-27-61 Rec'd RGC CMF					
6-30-61 Parole Cancelled					
9-29-61 Rec'd S.Q.					
10-18-61 PG. Revoked. Denied. Class on 6-66 cal.					
5-15-62 Def. rec'd ANC - Los Angeles Co.					
1-28-65 Noted. Remains 6-66 Calendar					

EXHIBIT B

SUMMARY OF SENTENCE DATA

	Credits Forfeited	Credits Restored	Additional Credits	Discharge Date	Parole Effective Date
CRIME: Robb. 1st (211-PC) 3 cts CC & 2 pr fel conv. P&P ea ct.					
TERM: 5-Life 3 cts CC&CC/~~CS~~ WPT ~~not shown~~					
COUNTY: Los Angeles					
County Case No.: 152703					
JUDGE: J. M. Onalthy (CJ)					
3-4-53 SQ PV WNT REC'D RGC, CIM					
3-6-53 Trans to Folsom enrt S.Q.					
3-9-53 Rec'd S.Q.					
2-26-57 DENIED P.P. TO MAR 58 CAL.					
2-26-58 DENIED P.P. TO 3-59 CAL.					
2-17-59 TFA - 10 10 10 YRS CC & CC WPT - Granted 3½ YRS CM PAROLE TO GO TO HOLD				3-4-63	9-4-59
~~5/6/53 Wanted Prosecuting Attorney Clay Co, Liberty Missouri~~				~~9-4-59~~	~~3-4-63~~
6/23/59 No longer Wanted Prosecuting Attorney Clay Co, Liberty, Mo.				G	
9-20-59 - condition of TO GO TO HOLD Removed					
9-29-59 Paroled Long Beach D. - Orange Co.					
6-20-61 PV WNT RECVD RGC, CIM				LIFE	
6-27-61 REC'D RGC, CMF					
6-30-61 Parole Cancelled.					
9-29-61 Rec'd S.Q.					
10-18-61 PG-Revoked Denied. Place on 6-66 cal.					
5-15-62 Dep. per ANC - Los Angeles Co.					
1-28-65 Noted. Remains on 6-66 Cal.					
6-30-66 Denied LL on MR Cal.					
6-27-67 Denied LL on MR Cal.					

SUMMARY OF SENTENCE DATA

	Credits Forfeited	Credits Restored	Additional Credits	Discharge Date	Parole Effective Date
CRIME: Robb 1st w/2 PFC CS WPT 211 PC					
TERM: 5-Life CS WPT					
COUNTY: Los Angeles					
County Case No.: 240891					
JUDGE: L. Drucker CC					
6-20-61 PV WNT REC'D RGC CIM					
6-27-61 REC'D RGC CMF					
9-29-61 Recd L. Q.					
5-15-62 Dep. to ANC - Los Angeles Co.					
1-28-65 Noted. Remarks					
on 6-66 Cal.					
6-30-66 Denied. (Le ow) MR Cal.					
6-27-67 Denied. (Le ow) MR Cal.					

A-9428-B ELLHAMER, William
Summary of Sentence Data

CDC-112 (3/65)

IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA
IN AND FOR THE COUNTY OF LOS ANGELES

JUDGMENT

Department No. 105

June 8 19 61 Present Hon. LEWIS DRUCKER Judge

THE PEOPLE OF THE STATE OF CALIFORNIA, vs 240891

WILLIAM ELLHAMER

Deputy District Attorney S Mayerson and the Defendant with counsel, R E Krause, present. Motion for new trial is denied. Defendant was not personally armed. No findings on criminal habitual statute. Probation denied. Sentenced as indicated.

762029

Whereas the said defendant having been duly found guilty in this court of the crime of ROBBERY (Sec 211 PC), a felony, as charged in the information as amended, which the Jury found to be Robbery of the first degree and the Court having found the defendant was not personally armed; admitted prior convictions as alleged, to wit: Robbery, a felony, Superior Court of the State of California, Los Angeles County, May 24, 1948; Robbery, a felony, Superior Court of the State of California, Los Angeles County, February 24, 1953 and served a term in a State Prison for each of said prior convictions

It is Therefore Ordered, Adjudged and Decreed that the said defendant be punished by imprisonment in the State Prison for the term prescribed by law, which sentence is ordered to run CONSECUTIVELY to sentences in Case No. 152703, Counts 3, 6 and 9.

It is further Ordered that the defendant be remanded into the custody of the Sheriff of the County of Los Angeles, to be by him delivered into the custody of the Director of Corrections at the California State Prison at Chino.

This Minute Order has been

entered on ... JUN 13 1961

HAROLD J. OSTLY, County Clerk and Clerk of the Superior Court of the State of California, in and for the County of Los Angeles.

By ..... Deputy

Prob.		Aud.	DMV
LAPD	/	Cshr.	CYA
CO. J.	/	Juv.	C. Clk.
Sher.	/	Psyc.	Misc.

JUDGMENT — State Prison (Men)

THE WITHIN INSTRUMENT IS A CORRECT COPY OF THE ORIGINAL ON FILE IN THIS OFFICE.
ATTEST:

CALIFORNIA STATE PRISON AT SAN QUENTIN
BY W. Schuller RECORDS OFFICER

(AFFIX SEAL)

16J807B—9/60

C. I. M.
1961 JUN 20 PM
G.C. ADMINISTRATIVE

EXHIBIT C

THE WITHIN INSTRUMENT IS A CORRECT COPY OF THE ORIGINAL ON FILE IN THIS OFFICE.
ATTEST:
CALIFORNIA STATE PRISON AT SAN QUENTIN
BY W C Schultz
RECORDS OFFICER
(AFFIX SEAL)

REPORT TO ADULT AUTHORITY
FROM: ADULT PAROLE BUREAU

Date: 6-21 19[illegible]

Name: ELHAMER, William (Paul Turner) Number: A-9428-A

Term: Robb. 2nd, CC W/S/E Term 10[illegible]10 yrs. CC & CC 10[illegible]
Robb. 1st Degree, & 2 Life Priors, etc. CC &/ Sen.

Received: 6-15-48 (S.C.) 1-4-53 Prod.: 2-4-59 Suprvsd: Returned: Expires: 3-4-[illegible]

Present Location: Reception Guidance Center, Vacaville, California

SUBJECT OF REPORT: VIOLATION

CHARGES SPECIFIED:

(1) William Elhamer did violate Condition 11 of the Conditions of Parole by committing Robbery in the 1st degree, as evidenced by his conviction, on 5-9-61, in Department 105 of the Los Angeles Superior Court, the Honorable Louis Drucker presiding. He was sentenced to the custody of the Director of Corrections for the term prescribed by law, this sentence to run consecutively with his prior term.

(2) William Elhamer did violate Condition 6 of the Conditions of Parole by associating with other ex-felons and active parolees without the specific approval of his parole agent or the APD.

SUPPORTING EVIDENCE:

Charge 1. On 3-3-61, Elhamer accompanied one Donald Baxter (an active Long Beach Division Office parolee) in the perpetration of a robbery at the Lucky Stores, Inc. Market, located at 11820 Alondra Blvd., Norwalk. The Assistant Manager of the Market, Donald McPherson, stated that Baxter had approached him in the middle of the store, pulled a gun out of his jacket, and stated, "This is a stickup, take me to the Manager or I will kill you." He further stated that Baxter put the gun back into his jacket and followed McPherson to the front of the store, where he called the Manager, Mr. Kenneth Green. Baxter then told Mr. Green, "Take me in and give me the money or I will kill you." Manager Green and McPherson went to the office with Baxter, who then pulled out a gun, holding it in his left hand, and gave the Manager a soiled pillowcase, stating, "Put the money in it and hurry up." Green then went alone to the rear of the office and brought the money to Baxter. Baxter then said, "I want it all" and inquired about the safe in the front office. The manager told him that the safe, which had a timelock, contained only change, whereupon Baxter told everyone to stay where they were, and left. McPherson followed and saw Elhamer throwing the money in the rear section of a dark blue 1960 Corvair coupe, license #VBK08[illegible].

EXHIBIT D

The car then left the location. It was found that the money taken in the robbery amounted to $1252; 45% one dollar bills, and 160 five dollar bills.

The police apprehended Baxter and Elhamer after sighting the vehicle which was parked in front of an apartment house at 9629 Oak Street in Bellflower.

Elhamer's arraignment was continued to 5-29-61, at which time he pled Not Guilty as charged. He was granted a jury trial and, on 5-9-61, he was found guilty of committing one count of robbery in the first degree. On 6-8-61, probation was denied and the Honorable Louis Drucker sentenced Elhamer to the custody of the Director of Corrections for the term prescribed by law, the sentence to run consecutively with Subject's prior term.

Charge 2. Elhamer wilfully and consciously associated with a person of bad reputation, to wit, parolee Donald Baxter, #69941, his crime partner in the above-mentioned offense. Police officials in Orange County also have intimated that Baxter and Elhamer maintained a swank apartment in the Garden Grove area, and that this apartment was frequently visited by persons of questionable reputation who were well known to the police.

EVALUATION OF PAROLE VIOLATOR:
Inasmuch as the writer has had no personal contact with Elhamer, the only evaluation that can be offered derives from the written record and facts gathered from the particulars of the instant offense. Elhamer is a recalcitrant well oriented in the ways of crime, who presently appears to be incapable of identifying with the more favorable segment of society. He has a definite proclivity for associating with those who are considered to be more advanced than amateurs in crime, and is prone to commit the more exciting and violent types of offenses. Perhaps some progress, though valueless, can be seen in the fact that Subject played a rather minor role in the perpetration of the instant offense.

Suggestions for Institutional Consideration: It is felt that Subject's institutional program should be designed to develop emotional maturation and appropriate social identification. Of value in this regard, perhaps, would be mandatory enrollment in a living community or similar group activity.

RECOMMENDATION: Parole canceled and return to prison ordered for the reasons set forth in the report of which this order is a part.

Respectfully submitted,

APPROVED:

District Supervisor

William R. Adamson
Parole Agent I

Regional Administrator

ELHAMER, William A-9428-A SPD/SA ego 6-21-61

STATE OF CALIFORNIA
Department of Corrections

CERTIFICATION OF ADULT AUTHORITY ACTION

TO THE DIRECTOR OF CORRECTIONS:

The Adult Authority took the following action at S.F.(Special Meeting), relating to parolees

ON June 30, 1961

A-9428A ELHAMER, William (SANTA ANA)

Parole canceled--return to prison ordered for the reasons set forth in the report of which this order is a part. (Term refixed at maximum in accordance with Resolution adopted 3-6-51.)

This is to certify that the above order is a true and correct copy of the action of the Adult Authority as shown on

PAGE 673 VOLUME 30 of the official minutes.

DATE July 5, 1961

JOSEPH A. SPANGLER
Administrative Officer

By _____
~~W. SUTTON,~~
~~SUPERVISING CLERK~~ I, California Adult Authority

THE WITHIN INSTRUMENT IS A CORRECT COPY OF THE ORIGINAL ON FILE IN THIS OFFICE.
ATTEST:

CALIFORNIA STATE PRISON
AT SAN QUENTIN
BY _____
RECORDS OFFICER

(AFFIX SEAL)

EXHIBIT E

State of California

Youth and Adult Corrections Agency

ADULT AUTHORITY

Meeting of
June 30, 1961
HELD AT SAN FRANCISCO (Special Meeting)

EXCERPT FROM MINUTES OF MEETING HELD ON THE ABOVE DATE FROM OFFICIAL RECORDS ON FILE IN THE OFFICE OF THE ADMINISTRATIVE OFFICER AT SACRAMENTO, CALIFORNIA.

TO WHOM IT MAY CONCERN:

Present were: O. Jahnsen, Member; C. Fitzharris, Vice-Chairman.

* *

PAROLES CANCELLED - RETURN TO PRISON ORDERED:

The Chief, Adult Parole Division presented reports in writing in each of the below-listed cases, (these reports are now on file in the office of the Adult Authority at Sacramento), charging that the below-named prisoners had wilfully violated the terms and conditions of their paroles.

The action in each of the following listed cases was "Parole cancelled, return to prison ordered for the reasons set forth in the report of which this order is a part."

A-9428A ELHAMER, William (SANTA ANA)

Due cause being shown by the Chief, Adult Parole Division, it is hereby ordered, that the paroles heretofore granted the above-named and numbered prisoners be suspended, cancelled, and/or revoked, upon the grounds that the above-named parolees have violated the terms and conditions of their paroles as more particularly set forth in the Chief's charges which are made a part of this order of revocation.

It is further ordered, that the Chief, Adult Parole Division shall return said prisoners to the custody of the Director of Corrections to abide further action of the Adult Authority.

It is further ordered in accordance with a resolution adopted by the Adult Authority on March 6, 1951 that the above-listed prisoners who have terms fixed at less than the maximum shall be refixed at the maximum until further order of the Authority.

In the event any of said prisoners shall be found in any State other than California an application for a requisition for the return of said prisoners is hereby authorized and the Chief, or Deputy Chief, is hereby authorized to execute such application for, and on behalf of, the Adult Authority.

* *

A D O P T E D B Y The affirmative votes of:

O. Jahnsen, Member;
C. Fitzharris, Vice-Chairman.

(Signed) Joseph A. Spangler, Administrative Officer

A T T E S T
June 30, 1961

A T T E S T August 22, 1967

JOSEPH A. SPANGLER
Administrative Officer

EXHIBIT F

CDC - 244-A (39252)

No. 21,900

In the

United States Court of Appeals

for the Ninth Circuit

OTIS CROOKER,	*Appellant,*
VS.	
WARREN GRAFT,	*Appellee.*

Appeal from the United States District Court for the District of Montana, Helena Division

Brief of Appellant

(Oral Argument Requested)

SMALL & CUMMINS
and
CARL A. HATCH
300 Fuller Avenue
Helena, Montana

Attorneys for Appellant

SORG PRINTING COMPANY OF CALIFORNIA, 346 FIRST STREET, SAN FRANCISCO 94105

SUBJECT INDEX

TABLE OF AUTHORITIES CITED

Cases

Statutes

Texts

No. 21,900

In the

United States Court of Appeals

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OTIS CROOKER,

Appellant,

vs.

WARREN GRAFT,

Appellee.

Appeal from the United States District Court for the District of Montana, Helena Division

Brief of Appellant

(Oral Argument Requested)

STATEMENT OF PLEADINGS AND FACTS

Warren Graft, appellee, a resident and citizen of the State of California, brought this action in the United States District Court for the District of Montana, Butte Division, against Otis Crooker, appellant, a resident and citizen of the State of Montana. Jurisdiction of the court was based upon Title 28, Section 1332, U.S.C., Mr. Graft having alleged that the parties were citizens of different states and the amount in controversy exceeded $10,000.00, exclusive of costs and interest. (Complaint, paragraph 1).

Mr. Graft, the owner-pilot of a Cessna 180 single-engine, high wing, four-passenger aircraft with amphibian landing gear, (Tr. 17), flew to Ennis, Montana, in late July, 1962, on a fishing trip (Tr. 19, 22). A friend, Dexter Whitcomb, rode with him (Tr. 22). The rear seat of the plane was removed to provide space and weight-carrying capacity because, as Mr. Graft stated, "I knew—where we would be operating and I wanted all the reserve power and weight-carrying capacity that I could get. . . ." (Tr. 22).

Mr. Graft landed at Ennis on *a private landing facility* owned by Otis Crooker, who operated a resort, "The Sportsman's Lodge," adjacent to the airstrip (Tr. 6, 7, 178). The landing strip was built by Mr. Crooker for his own use, but it was open to the public (Tr. 7, 178) as an accommodation to the community. Many of those who did use it did not patronize Mr. Crooker's resort facilities, but went elsewhere in the vicinity for accommodations (Tr. 180). In 1962, when Mr. Graft landed on the strip, no landing fee was charged to anybody landing there (Tr. 179). Mr. Crooker had oil and fuel for sale, but no mechanics or attendants were employed there. The pilots had to look after the needs of their aircraft themselves (Tr. 179).

The premises on which Mr. Crooker maintains his airport facilities is a block of land approximately 300 feet wide and 3,000 feet long (Tr. 182, 183). The runway, that portion of the field graded to smooth it down and mowed to keep the weeds down, begins at its eastern edge and is approximately 135 feet wide for the entire length of the premises (Tr. 185). The runway was laid out in straight lines by a surveyor (Tr. 184) and is composed of similar material as the surrounding terrain, gravel and dirt (Tr. 7). Through the years a gravel berm had piled up along the edges of the runway due to the grading. This berm is the only physical

structure defining the boundaries of the runway (Tr. 10, 195). The Montana Airport Directory published by the Montana Aeronautics Commission (Defendant's exhibit 22) stated that the boundaries were undefined (Tr. 195).

The remaining portion of the airport premises west of the runway is a rough field that has never been used nor maintained for landings and take-offs (Tr. 185, 186, 195, 196, See Plaintiff's exhibit 15). It is prairie terrain, like the surrounding country. At the time of this accident, because of vehicular traffic upon it from persons driving cars and trucks over it, particularly the northern two-thirds, there were markings showing the wear from that traffic (See Plaintiff's exhibits 4, 15). The southern one-third of the rough, unusable area had no wear from traffic, except for the trucks and cars coming to inspect the accident; consequently, the weeds and berm were sharply distinct. (See Plaintiff's exhibits 4, 6, 7, 15, 21).

In May of 1962, two months prior to this fishing trip, Mr. Graft had been to Ennis and had landed and taken off from Mr. Crooker's strip at least twice. At that time his plane was not equipped with amphibian landing gear (Tr. 96), that having been put on for his summer charter work (Tr. 98). In July, when he decided to return to Ennis to fish, he knew that he would be landing on a rough, unmarked field, but he did not remove the amphibian gear even though it was a relatively simple two or three-hour operation (Tr. 98). He did not note any substantial differences in the field in July from when he observed it in May (Tr. 97). Mr. Crooker had no restrictions about what kinds of planes could land on his field. He described the strip as "kind of like a public highway, they use it at their own will. The pilot would be the man in command of the aircraft, makes all the decisions." (Tr. 189). Mr. Graft experienced no difficulty landing the craft.

Slightly after daybreak on July 30, 1962, Mr. Graft made preparations to return to California (Tr. 26). He made the customary pilot inspection and check of his plane before take-off (Tr. 28, 31) and determined to take off from north to south because he felt the slight wind indicated that to be proper (Tr. 29), even though that direction was a slight uphill incline and into obstructions (Tr. 222). He wanted to use every bit of help he could get to get off the ground (Tr. 124). He estimated the weight of his load, including passengers, gear, gasoline, and oil, to be thirteen pounds under the allowable gross weight for the aircraft (Tr. 49). He did not take accurate weights, however, but was merely guessing from his experience (Tr. 103). He figured the baggage and gear to be only fifty pounds (Tr. 23, 103). Mr. Crooker, who stored the baggage and gear and had occasion to observe it, estimated it to be over two hundred pounds (Tr. 189). Mr. Graft did not check the temperature before his take-off (Tr. 113, 114).

Mr. Graft taxied to the north end of the field, made a final check of the aircraft, and started the take-off run (Tr. 31). His position on the field, he stated, was "right in the center" of what he presumed was the runway (Tr. 79, 116). Mr. Carkeek, a local flyer who was taking off at the same time, although viewing Mr. Graft's position on the runway from an angle, felt that he (Graft) was on "the active part of the runway." (Tr. 222).

Because the field was rough, Mr. Graft decided to make what is called a rough-field take-off—to get off the ground as soon as possible to avoid bouncing the airplane around excessively and straining the landing gear (Tr. 32). He raised the craft three or four feet off the ground, but apparently felt he was not picking up the speed necessary to clear the fences, power lines, and houses at the south end

of the field (Tr. 34). He thought that the power lines were sixty feet high; in reality, they were only thirty feet high (Tr. 125). Moreover, because of the clear air, he misjudged the power lines and houses to be closer than they actually were (Tr. 127, 128, 130). The optical illusion he experienced, his mistaken judgment about the height of the power lines, and the fact that the aircraft was not picking up the speed he felt was necessary to become safely airborne, caused him to abort the take-off (Tr. 33, 34, 128). He set the aircraft back on the field, making what he felt was a normal landing (Tr. 34, 129). Mr. Carkeek observed that he "touched back down on the active part of the runway, but to the west side of it." (Tr. 223). He had about half of the runway ahead of him to roll out (Tr. 34, 222), so he didn't think it necessary to use brakes (Tr. 130).

After rolling approximately five hundred feet, Mr. Graft felt a slight veering to the right (Tr. 34). Mr. Carkeek saw the aircraft take a slight angle to the right (Tr. 223). Mr. Graft felt obstructions hitting the wheels which slowed him down rapidly (Tr. 34). Suddenly he was dipping to the right and cartwheeling on the left wing, spinning around a half circle and facing the direction from which he came (Tr. 34). The plane came to rest about six hundred feet from the south end of the strip out in the rough field west of the runway (Tr. 35). The wheels on the floats were broken off, and the floats, wings, and fuselage were seriously damaged (Tr. 35).

Mr. Cantwell, an FAA flight operations inspector from Helena, Montana, investigated the accident. He observed the plane was "off to the west side of the runway, heading in the—in a northerly direction, and marks on the surface of the ground indicating that it had turned in that direction." Mr. Graft had gone off the runway—"the usable por-

tion where you could take an aircraft off safely." (Tr. 42). He was off the graveled area maybe ten or fifteen feet (Tr. 43). Mr. Cantwell saw distinguishable markings—scrapings—on the right hand side of the runway "at the point where the forward nose wheel on the float had given way." (Tr. 58). From that point it veered off the runway into the rough area west of the runway (Tr. 58). Mr. Cantwell's report and the drawing he made of the accident were based on information that Mr. Graft furnished him at the time (Tr. 74).

Mr. Carkeek didn't know what caused Mr. Graft to veer off, but he observed that Mr. Graft "did take a slight angle off until his right float hit this little berm of gravel over here on the edge of the runway. . . ." (Tr. 223, 246).

Mr. Crooker, in making a detailed inspection of the runway, found a scar which took a gradual angle to the right (Tr. 187). It was a gouge mark, made in the hard-packed gravel, much like a broom handle would make if it were dragged down the field (Tr. 188).

In his complaint Mr. Graft alleged that Mr. Crooker:

(a) invited the public to use his landing field and represented to the public that it was reasonably safe (Complaint, paragraph 4);

(b) had a duty to maintain the runway in a reasonably safe condition and to warn of any obstructions or hazards thereon (Complaint, paragraph 5);

(c) negligently maintained the runway (Complaint, paragraph 6), which caused plaintiff to wreck his aircraft thereon (Complaint, paragraph 7, 8).

Mr. Crooker in his answer:

(a) admitted that he was a citizen of the State of Montana, but denied that the matter in controversy exceeded the sum of $10,000.00 (Answer, Second Defense, paragraph I):

(b) admitted that he owned the private airport at Ennis, Montana, that it was maintained in conjunction with his resort, and that fuel was available for sale there (Answer, Second Defense, paragraph III);

(c) alleged that the airport was not designed to handle amphibian type craft (Answer, Second Defense paragraph III);

(d) denied any negligence in maintaining the runway and that any duty rested upon him to warn of hazards and obstructions (Answer, Second Defense, paragraph V);

(e) denied making any representation to the public that the landing strip was reasonably safe (Answer, Second Defense, paragraph IV);

(f) affirmatively charged Mr. Graft with contributory negligence as a proximate cause of the accident (Answer, Third Defense);

(g) affirmatively charged Mr. Graft with assumption of risk for landing the type of craft that he did on an unmarked field (Answer, Fourth Defense).

STATEMENT OF THE CASE

This case involves a question of property damages to a Cessna 180 aircraft equipped with amphibian landing gear which its owner-pilot wrecked on a rough, gravel and dirt, unmarked private landing field at Ennis, Montana, on July 30, 1962. The plaintiff, Warren Graft, felt that the defendant, Otis Crooker, should have marked the runway in some manner more obvious than it was, that the failure to so mark the runway was a failure, under the circumstances, to warn of hazards and dangers existing in the unusable portion of the landing field west of the runway. Mr. Crooker denied any negligence on his part and affirmatively charged Mr. Graft with sole responsibility for the damages and

with assuming the risks inherent in landing a plane with floats on a rough, unmarked field.

The case was filed in the Butte Division of the United States District Court for the District of Montana, but was transferred for hearing to the Helena Division. It was heard by the Honorable Russell E. Smith, District Judge, sitting without a jury, on January 23 and January 24, 1967. The Court made findings of fact and conclusions of law supporting plaintiff and ordered judgment to be entered awarding damages to plaintiff of $9,111.00, with costs. Defendant filed objections and exceptions to the Court's findings of fact and conclusions of law and moved for a new trial. The objections and exceptions were overruled and the motion for a new trial was denied. From the order denying a new trial and from the judgment awarding damages to plaintiff, defendant appeals.

SPECIFICATION OF ERRORS

(1) The District Court erred in finding appellant negligent in failing to warn appellee of obstructions on appellant's airfield and that such negligence was the proximate cause of appellee's damages.

(2) The District Court erred in finding that appellee's negligence in attempting to take off or in aborting the take-off in the manner in which he did was not the proximate cause of appellee's damages.

(3) The District Court's finding of fact that "at the south end (of appellant's runway) there was a noticeable berm of soil and substantial differences in the appearance of the weeds" is inconsistent with the District Court's conclusion as expressed in its opinion that appellee was not warned of obstructions on the appellant's premises "either by oral or written notice or by the appearance of the field."

(4) The District Court erred in finding that the negligence of appellant, (if any), was the proximate cause of this accident.

The above contentions are argued herein under the following propositions:

I. There Was No Negligence on the Part of Appellant.

II. There Is No Duty to Warn of Obvious Dangers About Which a Person Upon the Premises of Another Knows or Is Reasonably Expected to Discover.

III. Appellee Was Guilty of Contributory Negligence Which Was a Proximate Cause of the Accident.

IV. If Appellant Was Negligent, Such Negligence Was Not the Proximate Cause of This Accident.

ARGUMENT

I. There Was No Negligence on the Part of Appellant.

Appellant contends that the District Court erred in finding and concluding that he was guilty of negligence which was a proximate cause of the accident (Conclusion of Law No. III). By its Finding of Fact No. V, the Court states that "the boundaries between the usable and unusable parts of the airport are not marked by artificial monuments". This apparently was the principal basis of the Court's finding that appellant was guilty of negligence. However, it is to be noted that the District Court also found that "at the south end there was a noticeable berm of soil and substantial differences in the appearance of the weeds" separating the usable landing strip from the rough, unusable portion of the airport. It was at the south end of the airstrip (where this noticeable line of demarcation existed between the usable landing strip and the unusable

area to the west) that the accident occurred. It was here that appellee's plane, after the aborted takeoff, while rolling out in a southerly direction along the usable strip, veered off to the right until it struck the berm of soil and rock on the edge of the runway and was thereby thrown around onto the rough, unusable area to the west of the airstrip.

It is manifest that if appellee, after landing his plane on the usable strip, had continued his roll-out straight ahead down the strip instead of causing or permitting his plane to veer off to the right toward the rough, unusable area, this accident would not have occurred. As noted above, the District Court has specifically found that a "noticeable berm of soil and substantial differences in the appearance of the weeds" distinguished the usable landing strip from the rough, unusable area to its west, there in plain sight for plaintiff to see if he had been keeping a lookout ahead. This is clearly illustrated by exhibits 6 and 7, which were pictures taken by appellee himself. These conditions, as illustrated by the evidence and by the Court's findings, rather clearly contradict the Court's finding of negligence on the part of appellant because of his failure to mark the boundaries between the usable and unusable parts of the airport by "artificial monuments". Moreover, in this connection, it is to be noted that in the official Montana Airport Directory, the Ennis airport which is involved here is designated as an *unmarked strip* (Exhibit D22 and Transcript 125).

In twenty-one years of operation of this airstrip (Tr. 6), appellant has never had another plane run off the usable landing strip onto the rough area which adjoins it (Tr. 184 and 185) as the appellee did here.

The District Court concluded in its opinion here that "plaintiff was in no different position than a pilot who had arrived at that place on the runway without negligence and was rolling to a stop". This conclusion, appellant submits, is erroneous and wholly unjustified under the evidence in this case. The situation here was entirely different from that of a normal landing of a plane on that airstrip. Here Mr. Graft was aborting a take-off making an emergency landing, with all the human excitement and pressure that would naturally be incident to such a landing. It certainly was not a normal landing.

First, the plaintiff (appellee) admitted that he misjudged the heighth of the power lines that he would have to clear at the south end of the landing strip. He estimated the heighth of such power lines at sixty feet, when actually they were only thirty feet high (Tr. 125). He admits he aborted the take-off because he made the mistake of thinking the power lines were closer than they actually were (Tr. 127). He called it a "mirage or optical illusion" (Tr. 128), and he admitted that was the first time he had ever had to abort a take-off (Tr. 128). He also admitted that by reason of the foregoing factors when he aborted the take-off and landed on the strip, he thought he was a lot closer to the south end of the strip than was actually the case (Tr. 130). He was not sure about whether he applied his brakes or the extent to which he may have applied them (Tr. 130). Thus we see it is clear that appellee was suffering the stress and strain of an emergency landing because of what he called "an optical illusion". He thought he was much closer to the end of the strip than he actually was (Tr. 130). This obviously was the reason he started veering his plane to the right in its roll-out to avoid running into the fence at the end of the strip (Tr. 223) and in veer-

ing off to the right he hit the berm that marked the west boundary line of the usable strip and this is what caused the accident.

In the light of these facts it is difficult to comprehend how the District Court could conclude (as it did in its opinion) that "the aircraft does not appear to have been out of control nor was the roll-out in its initial stage different from that which might have followed a normal landing". On the contrary, appellant submits that the facts as established by appellee's own testimony, bring this case squarely within the observation made by the District Court in its opinion, as follows:

> "In the excitement and emergency of an unplanned landing, he might have executed a faulty touchdown. His negligence would have barred recovery for damages arising from any of these events."

Appellant contends that there was no negligence shown on his part which could have created any hazard to any pilot or plane attempting to make a normal landing on this airstrip, and this, we believe, is the basis of the error of the District Court's finding of any negligence on the part of appellant here. It might also be added that exhibits 3, 4, 8, 15, and 21, are pictures taken by appellee himself from the air, which clearly disclose the condition of this airport and of the distinction between the 135-foot airstrip and the remainder of the rough area comprising a part of the premises.

We submit that these exhibits clearly refute the claim of appellele that it was impossible to determine which was the usable landing strip or runway, as distinguished from the rough area to the west of it. Likewise, these exhibits rather emphatically fortify the testimony of appellant as well as that of the witnesses, Newby (Tr. 148), Carkeek

(Tr. 219-220), and Ford (Tr. 235), (all of whom were pilots, were familiar with this airstrip, and had flown planes on and off from it many times), that the usable strip or runway involved here was clearly defined and perfectly obvious to any pilot seeking to land upon such strip.

II. There Is No Duty to Warn of Obvious Dangers About Which a Person Upon the Premises of Another Knows or Is Reasonably Expected to Discover.

A land owner has no obligation to protect persons upon his premises against dangers which are known, obvious, or so apparent that those persons may reasonably be expected to discover them by looking out for themselves. See Prosser, *Torts,* § 78, p. 495. In such a case, the necessity of a warning by the landowner is obviated because of the very nature of the premises. *The warning is given by the condition and appearance the premises present.* As stated by the annotators in 38 Am. Jur., *Negligence,* § 97, pp. 757-8:

> "There is no liability for injuries from dangers that are obvious, reasonably apparent, or as well known to the person injured as they are to the owner or occupant."

In the Montana case, *Myles v. Helena Motors, Inc.,* 113 Mont. 92, 121 P.2d 549 (1941), an action was instituted by a customer against a businessman for injuries sustained on the premises of the businessman. The customer, while walking from the rear of the building to the office in broad daylight, struck his head on an automobile hoist that was in plain view. He said that he was watching the floor for oil. Said the Court at 113 Mont. 96:

> "It is our view that on the evidence in the case plaintiff has failed to show any negligence on the part of the defendant, and that, if the cause had been sub-

> mitted to the jury and a verdict returned in plaintiff's favor, it would have been the duty of the court to set it aside. The hoist in question was in plain view. It was daylight and the place was well lighted. It was not what may be denominated a hidden defect in any sense. The fact that plaintiff was obliged to watch where he stepped to avoid stepping in oil was no reason why he could not also observe the hoist that stood directly in his path . . . While, as owner of the garage, the defendant was under obligation to warn the plaintiff of any hidden dangers on the premises . . . *we fail to see where it owed any duty to warn plaintiff of the presence of the hoist which was as open and obvious to him as to the defendant.*" (Emphasis added)

In the case *Anderson v. Sears, Roebuck and Co.,* 223 Minn. 1, 26 N.W.2d 355 (1947), the plaintiff stepped off a six-inch riser to the floor level of defendant's store and was thrown off balance. The court affirmed the defendant's motion to dismiss the action on the merits at the close of the plaintiff's case, holding in effect that when the premises of a business establishment have upon them counters, merchandise trucks, and other essential merchandising equipment which are in full sight and within the observation of everyone, and do not threaten danger to those visiting the store on business, the merchant is not liable for accidents which result to a customer or invitee from his own carelessness and inattention to surroundings.

In a similar case in Kentucky, *J. C. Penney Co. v. Mayers,* (Ky.), 255 S.W.2d 639 (1952), the customer fell down a four-inch step to the sidewalk. A judgment for the customer was reversed, and she was held to have been negligent and the store not to have been negligent. The court followed the rule that, while generally, a store owner is under a duty to use reasonable care to keep his premises in a safe condition, nevertheless a customer, upon entering

the store, must make a reasonable use of his own faculties to observe and avoid dangers which are obvious. The court said that a business customer's right to assume that the premises are reasonably safe does not relieve him of the duty to exercise ordinary care for his own safety, nor license him to walk blindly into dangers which are obvious, known to him, or that could be anticipated by one exercising ordinary prudence.

The Kentucky court followed this same rule in *O. K. Tire Store #3, Inc. v. Stovall,* (Ky.), 392 S.W.2d 43 (1965), in which a customer came to the tire store to make a payment on his account and to have a tire checked. While he was watching an employee check the tire, he stepped backward into a five-gallon bucket of white sidewall cleaner containing lye, burning his leg seriously. The court said that there was no negligence on the part of the tire shop and that the customer was negligent as a matter of law for failing to see for himself the obvious danger.

A Missouri case arising in the eighth circuit, *Collette v. Crown Cork and Seal Co.,* 362 F.2d 458 (1966), involved an action by a pipefitter against a plant owner for injuries occurring when the pipefitter applied heat to a lacquer line and it caught on fire. The court, finding no duty to warn under Missouri law, when the plaintiff has reason to know the danger through his own observation, said that the dangerous condition need not have been so obvious that it was visible to the plaintiff pipefitter's naked eye to obviate the defendant plant owner's duty to warn. As long as plaintiff was aware or should have been constructively aware of the danger, the defendant was not negligent in failing to give any warning.

The Montana Supreme Court has just recently affirmed the rule that there is no duty owed to an invitee with respect to dangerous conditions if, under the circumstances,

it would be reasonable to expect that an ordinary person would observe the danger. *Regedahl v. Safeway Stores, Inc.*, —Mont.—, 425 P.2d 335 (1967), citing *Clark v. Worrall,* 146 Mont. 374, 406 P.2d 822 (1965).

In the case of *Eastern Airlines, Inc. v. United States* (DCNY), 132 Fed. Supp. 787, recovery for injury to an aircraft was denied where the airplane had, under emergency conditions, touched down at night about half-way down the airstrip rather than near its beginning, and because of slush and ice on the strip was unable to stop at the speed at which it was going and crashed through a structure about eight feet high located 175 feet past the end of the airstrip. The court found that the structure involved was reasonably designed and situated so as to present no hazard to airplanes. See further 8 Am. Jur. 2d, § 79, p. 702.

It cannot be doubted that in this case Mr. Graft knew, or in the exercise of reasonable care should have known, the dangers made obvious by the appearance of this airfield, and especially the dangers in driving a plane with amphibian landing gear on this rough, unmarked landing field. He can't claim that he was not familiar with the strip, having landed on it at least three times before the accident, and having taken off from it at least twice before. Certainly he saw what was in plain sight then and knew the location of the runway. Moreover, he cannot expect the court to believe that he, an experienced pilot, really thought and assumed that the entire 300-foot wide field was a runway which could be driven on safely anywhere. Even the airports of Montana's largest cities, Great Falls, Billings, and Helena, for example, have runways of only standard width—150 feet. (See Defendant's exhibit 22). If Mr. Graft had driven off the runway of one of those airports, no doubt he would have experienced the same trouble he encountered at Ennis.

The truth of this matter is simply that Mr. Graft did not appreciate what was made obvious by the surroundings and appearance of the premises. By not watching where he was going, or not having his craft under control, or not being able to control it, he drove off the runway and wrecked his plane. He should have known, if in fact he did not truly know, that a plane with an amphibian landing gear could not safely drive in the high weeds and bumpy, unsmoothed terrain west of the runway. Under the law he is charged with the duty to look and to see what is in plain sight. As a matter of law he must be held to have seen what looking would have revealed.

III. Appellee Was Guilty of Contributory Negligence Which Was a Proximate Cause of the Accident.

The District Court found that appellee was guilty of negligence in several particulars and in attempting to take off as he did. Thus, by its Finding No. VII, the Court states:

> "The failure of the aircraft to gain airspeed was not the result of an engine failure. The failure was due to the fact that that aircraft on that field, with that surface, at that elevation, with that load and at that temperature simply did not have the capacity to fly away. A careful appraisal of these factors before the takeoff would have indicated to the plaintiff what the takeoff did reveal, i.e., that the operation was risky."

However, the Court then concludes that such negligence of appellee was not a proximate cause of the accident. Appellant contends that such conclusion is erroneous and that the negligent acts and omissions of appellee specifically noted by the Court relative to the take-off were a part of the active, efficient and proximate cause of this accident, and without which the accident would not have occurred.

Moreover, in addition to the negligent acts and omissions of the appellee which were noted and mentioned by the Court relative to the initial take-off, the evidence clearly discloses that appellee was also negligent in several particulars relative to aborting the take-off. For example, he misjudged the heighth of the power lines at the end of the runway (Tr. 125) and he admits he aborted the take-off because he made the mistake of thinking the power lines were closer than they actually were. He called it a "mirage or optical illusion". (Tr. 127-128). Then, after landing his plane back on the runway at a point where he still had plenty of room for a normal roll-out if he had continued on straight down the runway (Tr. 33-34), he failed to continue rolling straight, but instead, caused his plane to veer off to the right until it struck the west edge of the runway and ran off into the rough (or unusable) area adjacent to such runway (Tr. 223).

The facts discussed above conclusively show that appellee's negligence, as the Court found, placed him in the position in which he found himself on the runway. They further show, appellant submits, that appellee failed to control his aircraft under the circumstances and to see what he would have seen had he looked, that he was drifting into the rocks and high weeds off the runway. This series of events began with appellee's faulty take-off and continued in unbroken sequence to the accident off the runway at the south end of the airport.

Appellant respectfully submits that the foregoing facts, which were apparently overlooked by the District Court, demonstrate rather forcibly that appellee was guilty of a continuous series of negligent acts and omissions which continued right up to the moment of the accident and which clearly contributed to the happening of such accident, if they were not, indeed, the sole cause of it.

In holding that although the appellee was guilty of contributory negligence, such negligence was not the proximate cause of the accident here, the District Court in its opinion made the following statement:

> "In short, had plaintiff not been negligent in getting his aircraft into the air, the accident would not have occurred. From this does it follow that plaintiff's negligence was a proximate cause of the accident?"

In support of this conclusion, the Court cites and relies upon the case of *Barry v. Sugar Notch Borough,* 191 Pa. 345, 43 A.240 (1899), where a violation of a speed ordinance brought plaintiff under a falling tree.

By its reliance upon this and other similar cases set forth in the opinion, appellant believes that the Court has illustrated the error of its thinking on this proposition. Indeed, appellant submits that the case referred to does not present a situation which is fairly analogous upon the facts to the instant case, to permit its use as an authority here. Indeed, in the same case (Barry v. Sugar Notch Borough), if the facts had been slightly different to the extent that a tree had fallen across a portion of a street or highway and was blocking the same, and the plaintiff had been guilty of speeding and by reason thereof, unable to avoid crashing into the fallen tree, it certainly would not be contended that the plaintiff was not guilty of contributory negligence which might have barred his recovery. A similar distinction, appellant believes, can be found as to all the other cases cited by the Court in its opinion here relative to this proposition.

Further, in connection with this question of proximate cause, there appears a rather extensive and applicable annotation in 100 ALR2d, beginning at page 942. At page 946 of that annotation appear the following pertinent observations:

> "After an appraisal of the authorities, the comment agreed with the conclusion that no definite principle can be laid down by which to determine the question of 'proximate cause,' but that the question '*is always to be determined on the facts of each case* upon mixed considerations of logic, common sense, justice, policy, and precedent. . . . The best use that can be made of the authorities . . . is merely to furnish illustrations of situations which judicious men . . . have adjudged to be on one side of the line or the other.'" (Emphasis added).

and so appellant says here that a fair and reasonable application of the foregoing principles to the facts in the instant case must necessarily lead to the conclusion that the appellee was, as the District Court has found, guilty of contributory negligence in a number of particulars and also that such contributory negligence was, without question, the proximate cause of this accident.

IV. If Appellant Was Negligent, Such Negligence Was Not the Proximate Cause of This Accident.

Assuming, but not conceding, that the District Court was correct in finding that appellant was in some degree negligent, we submit that any such negligence could not, under the law as established by Montana decisions, possibly be considered as a proximate cause of the accident involved here. In such situations the Montana Supreme Court has rather clearly pointed out that the negligence of appellant, if any, did nothing more than create a condition, as distinguished from a cause of the accident. Thus, in the case of *Staff v. Montana Petroleum Co.,* 88 Mont. 145, 291 Pac. 1042 (1930) it was held (quoting syllabus):

> "Where plaintiff's negligence does nothing more than furnish a condition by which injury is made possible, and that condition causes an injury by the subsequent

independent act of another person, the two are not concurrent and the existence of the condition is not the proximate cause of the injury."

". . . the contention of defendant that the explosion, under the conditions above referred to, was due to plaintiff's contributory negligence in failing to keep the service pipes in good repair may not be upheld, it appearing that the pipes were examined under direction of the city authorities by the very employee who caused the explosion by his negligence; further, that the striking of the match by such employee was the proximate or efficient cause, and that, *if plaintiff was negligent in allowing gas to accumulate in the cellar, her act in that regard was only a condition as distinguished from a cause.*" (Emphasis added)

In conformity with the rule laid down in the foregoing decision and other Montana cases cited therein, it is clear that any negligence on the part of appellant here must necessarily be considered as doing nothing more than creating a condition as distinguished from the efficient, active cause of such accident, which, as hereinabove pointed out, consisted of the negligent acts and omissions of the appellee, beginning with his negligence in assuming to take off (which was noted by the District Court), and continuing thereafter with his negligent acts and omissions relative to aborting such take-off, and which continued right up to the occurrence of the accident.

CONCLUSION

Based upon the facts and the law governing this case, the District Court erred in entering its judgment in favor of the appellee and in refusing to grant a judgment in favor of the appellant. That judgment should be reversed and judgment should be entered for appellant.

Respectfully submitted,

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CERTIFICATION

I certify that in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the Rules of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

FLOYD O. SMALL
Floyd O. Small

No. 21900

In the

United States Court of Appeals

For the Ninth Circuit

OTIS CROOKER,

Appellant,

vs.

WARREN GRAFT,

Appellee.

Brief of Appellee

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STATEMENT OF FACTS

In our view the statement of facts in the appellant's brief presents a completely one-sided and distorted version of the facts of this case. For that reason we deem it essential to present our own statement in this brief.

For approximately sixteen years prior to July 30, 1962, the date of the accident, and continuously thereafter, the defendant, Otis Crooker, has owned, maintained and operated a resort business at Ennis, Montana. During that period he has maintained for the use of his patrons cabins, a bar and cafe, and as an incident to that business, an airport upon his premises. While a greater number of his patrons are transported to this facility by private auto-

mobiles, a substantial number of them come and go by private aircraft, using the facilities maintained by Mr. Crooker for that purpose. Gasoline and oil for airplanes are available for puchase at the airport, at the retail prices customarily charged in that area. Since the airport has no permanent attendant, aircraft owners desiring to purchase fuel must either service their airplanes themselves or call upon Mr. Crooker to do so. (Tr. 6-8, 206.) Mr. Crooker testified that he charged no fees for the privilege of landing at his airport, but he was unable to name any private airport in Montana where such fees are charged, and could cite only one public airport, West Yellowstone, which imposes a landing fee. (Tr. 194, 195.)

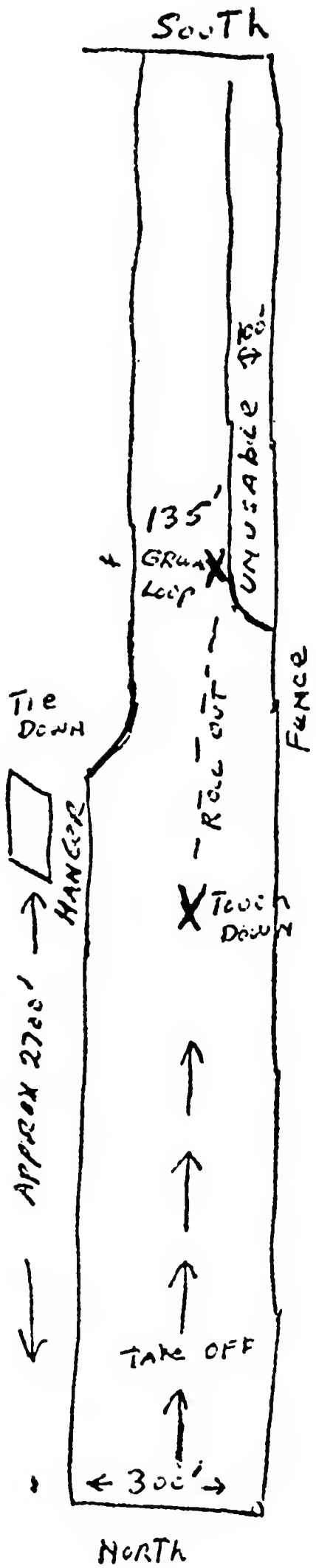
The airport at its nearest point is about 200 feet from the rest of Crooker's resort. It is approximately 300 feet wide by 3600 feet long, with a fence running in a north-south direction along the west boundary. Crooker testified that of this area, he maintained for runway purposes only the easterly 135 feet, and that this was a constant width from the north end to the south end of the airport. He testified that the remainder of the tract, consisting of the entire westerly portion, was "unusable" as a runway, and that there was a clear distinction between the usable and unusable portions throughout the length of the airport. (Tr. 183-185.) His testimony is controverted by the testimony of the plaintiff, Mr. Graft; also by the testimony of Mr. Cantwell, an FAA inspector who examined the premises immediately after the accident and who drew an outline of the runway for inclusion in his report; and also by the photographs taken by Mr. Graft at the time of and a week or so after the accident.

The plat of the Ennis airport, on file at that time as a part of the public records of the Federal Aviation Agency, disclosed a runway 3667 feet in length with a uniform

width of 300 feet. (Plaintiff's Exhibit No. 1.) Mr. Cantwell testified that such plats were prepared from information obtained either from the airport operator or from visual inspection made by FAA personnel. (Tr. 45.) Mr. Crooker, the defendant, recalled that his airport had been inspected or observed by employees of the Federal Aviation Agency and he believed that this map had been prepared by such inspection. (Tr. 12.)

Mr. Cantwell, flight operations inspector for the Federal Aviation Agency, was at the scene of the accident a few hours after it happened. (Tr. 38.) He made a visual inspection of the field for the purpose of determining the cause of the accident, and paced off the boundaries of the runway. This inspection disclosed to him that the usable runway was approximately 300 feet wide at its north end and that the runway maintained this width for approximately two-thirds of its length, going south and that from that point to the south end of the runway, it narrowed to a width of approximately 135 feet. It appeared to Mr. Cantwell that the unusable portion in the southerly one-third of the runway had been made so by excavation and grading which had been conducted there. (Tr. 47.) To illustrate his findings, he drew a sketch showing both the outside boundaries of the runway and the usable portion thereof and made this sketch a part of his accident report. This sketch, which is a part of Plaintiff's Exhibit No. 2, is reproduced on the following page (P. 4) of this brief, for the convenience of the Court.

The portion which Mr. Cantwell designated as unusable was found by him to contain boulders, depressions and soft dirt, as distinguished from the gravel surface of the usable portion. Mr. Cantwell's inspection disclosed that there were no visible markings to indicate the boundaries of the runway. He testified that normally in cases like this the


SOUTH
UNUSABLE
135'
GRUND LOOP
TIE DOWN
HANGER
ROLL OUT
FENCE
TOUCH DOWN
APPROX 2700'
TAKE OFF
300'
NORTH

boundaries of the runway are marked by flags or by some other form of marker. (Tr. 50, 51.) Upon his return to Helena, he checked the records at the FAA office and found no NOTAMS with respect to this field. NOTAMS are published FAA reports issued for pilots' information, which indicate peculiar characteristics or hazards existing at particular airports. He testified that in the case of private airports the FAA depends upon information furnished to it by the airport owner. (Tr. 52.) Shortly before his flight, Mr. Graft checked the published NOTAMS to determine whether special hazards existed at the Ennis airport, and found nothing. (Tr. 140.)

It is undisputed, and admitted by Mr. Crooker, that no signs or notices of any kind were posted in the area, indicating the usable portion of the strip. No mention was made by Mr. Crooker to Mr. Graft of any peculiar conditions at the airport, although Crooker fueled the airplane in Graft's presence on the previous day and at that time noticed that it was an amphibian. (Tr. 209.)

Mr. Graft had carefully computed the airplane load before leaving. The rear seat, which on this trip was unnecessary weight, was removed, thus reducing the overall weight by approximately twenty pounds. (Tr. 22.) He and his passenger took with them luggage and fishing gear estimated by Mr. Graft to have a maximum weight of fifty pounds. (Tr. 24.) Although Mr. Crooker stated that he observed the luggage and estimated it to weigh about 200 pounds, his cross-examination disclosed that, in his recollection, the luggage consisted of two brief case-sized suitcases, about one foot high and eight inches thick, two duffle bags, and two or three fishing rods. Of these items, he picked up only one suitcase and pushed aside the fishing rods. He picked up no other items. (Tr. 190-194.)

On the morning of their departure, Mr. Graft's party arose about daybreak, loaded their airplanes and were prepared to take off within an hour to an hour and a half. Mr. Graft does not recall the temperature that morning, except that it was "a little chilly," jackets were required, and they had to wipe the dew from the windshield. (Tr. 26, 27.) Mr. Porter, a member of their party, had checked the weather and had relayed this information along to Mr. Graft. As he started the airplane, Graft noticed that the windsock on top of the hangar showed a variable southerly wind of between five and ten miles per hour. He was aware of no slope from north to south, and the runway appeared to be fairly level. On the basis of this observation, he determined to take off from north to south and he taxied to the north end of the runway, accompanied by another airplane belonging to Mr. Chapman, of his party. (Tr. 30.) After arriving at the end of the runway, he performed the usual checking and testing procedures and determined that the aircraft was functioning properly. (Tr. 31.) He then taxied into position on the runway, at what he considered to be the center thereof, halfway between the east boundary line and the fence on the west. At that point the entire width of approximately 300 feet appeared to him to be usable, and there were no indications to the contrary for as far south as he could see at that point. In his words, "It all looked like it was the same width all the way through from one end to the other." (Tr. 80.) Mr. Graft then commenced his takeoff, maintaining at all times a close observation of the runway ahead of him. The wheels of the airplane left the ground at a point approximately one-third of the way down the runway, Mr. Graft having elevated the airplane as quickly as possible because of the rough field conditions. (Tr. 33.) The airplane was leveled about four

to five feet off the ground to gain air speed before climbing out. When about half of the runway had been traversed, and while at this altitude, the plaintiff was faced with the decision of whether to attempt to climb out over the obstructions on the south end of the runway, or to abort the takeoff and land on the remaining portion. Since he was in doubt as to whether he could clear the obstructions, he decided to abort. (Tr. 34.) During all of this time, up to that point and thereafter, he maintained a close and steady lookout forward down the runway. The appearance of the terrain remained the same, and nothing in his vision warned him of a rough terrain ahead, or of the narrowing of the runway toward the south end. (Tr. 80, 81.) He made a smooth and uneventful touchdown and was completing his rollout without difficulty until at a point about 500 feet from the south end of the runway he encountered obstructions in the runway causing the aircraft to cartwheel and to be extensively damaged. (Tr. 33-35.)

The appellant's statement of facts intimates that the accident was caused by a change in course of the aircraft to the right after it touched down, and further intimates that this alleged change in direction was caused by some defect occurring upon the touchdown. (Appellant's Brief, pages 5 and 6.) There is nothing in the record which will support these conclusions, and they are directly contrary to the court's findings of fact. As stated by the court in its Finding of Fact No. IV: "While the aircraft apparently turned somewhat to the west after touchdown, there is no evidence of any violent swerving at the time of touchdown nor that the aircraft was out of control until the obstructions were encountered." While it is true, as plaintiff states, that the aircraft came to rest at a point to the west of the "runway," which had narrowed as indicated in Mr. Cantwell's map, it

was still well within the area where Mr. Graft expected to find runway, with ample justification.

Contrary to appellant's statement of facts, Mr. Cantwell did not find "distinguishable markings-scrapings" at any point on the usable portion of the runway, but found such marks at a point in the unusable portion, where he felt that the bow wheel had given way. (Tr. 58.) That marking on the surface was only "slightly to the right" of the point where plaintiff had originally touched down. (Tr. 59.)

Appellant's statement that Mr. Cantwell's drawing was based on information furnished by Mr. Graft is likewise incorrect. The drawing was based on the observations made by Mr. Cantwell at the scene within a few hours after the accident, and his dimensions were the result of his having paced off the field. (Tr. 44, 61, 63.)

Upon these facts, the court concluded that the relationship between the plaintiff and the defendant was that of business invitee and business invitor; that the defendant owed to the plaintiff the duty to use reasonable care to provide a reasonably safe place for the landing and takeoff of plaintiff's aircraft and a duty to warn the plaintiff of any hidden dangers; that the failure to more clearly delineate the usable from the unusable parts of the airport rendered the same unsafe in the absence of any warnings; that no warnings were given and the defendant was guilty of negligence, which was a proximate cause of the accident. (Findings of Fact No. II and III.)

The court further held that the act of the plaintiff in aborting the takeoff was not negligent; that the plaintiff was negligent in attempting to take off under the circumstances and with the existing load, but that his negligence in that respect was not a proximate cause of the accident. (Finding of Fact No. IV.)

ARGUMENT

The Plaintiff Was a Business Invitee to Whom the Defendant Owed the Duty to Warn of Obstructions on the Airport.

The defendant has not formerly assigned as error the finding that the plaintiff was a business invitee. Nevertheless, counsel have argued that Crooker's airport facility was maintained as an accommodation to the public, that his sales of aircraft fuel were unprofitable, and that he charged no fee for the privilege of landing at his airport. (Appellant's Brief, page 2.) It is undisputed, however, that the airport was maintained by Mr. Crooker as an integral part of his resort facility, a profitable operation, that it was advertised in the directory of the Montana Aeronautics Commission and in the records of the Federal Aviation Agency, and that a substantial number of his patrons arrived at the resort by means of the airport. We submit that the plaintiff, a patron of the defendant, was a business invitee, and that the defendant had the duties of an invitor with respect to his premises.

The duties of an airport operator with respect to his premises are expressed in *Corpus Juris Secundum,* Volume 2, *Aerial Navigation,* page 913, as follows:

> "An airport owner has a duty to keep the runway free from obstructions, so far as possible, or to place markers where required, to warn pilots of danger."

And in the supplement to that work, section 36, note 63.15, it is stated:

> "An airport operator has duty to see that airport is safe for aircraft and to give proper warning of any danger."

In *Beck v. Wing's Field, Inc.,* D.C., E.D. Pa., 1940, 35 F.Supp. 953, the plaintiff damaged his aircraft when he

encountered a dip in defendant's runway upon landing. The court denied a motion for new trial after a jury verdict for the plaintiff, and upheld the following instructions which had been given to the jury:

> "The owner of premises, such as the defendant here, who owned, operated and maintained a commercial landing field for airplanes, upon which persons like the plaintiff come by invitation, express or implied, owes a duty to such persons to maintain the premises in a reasonably safe condition for the contemplated use thereof, and the purposes for which the invitation was extended.
>
> "The defendant owed a legal duty to the plaintiff to use reasonable care to keep the premises in a reasonably safe condition so that the plaintiff in landing his aircraft would not be unreasonably exposed to any danger."

In *Mills v. Orcas Power & Light Co.,* 56 Wash.2d 807, 355 P.2d 781, the Washington Supreme Court stated, by way of dicta:

> "A public airfield extends an implied invitation to aircraft, and the duty owed, therefore, is one of reasonable care to see that the premises are safe. (Citing cases.) The law thus places on proprietors of airfields the obligation to see that the airport is safe for such aircraft as are entitled to use it, and to give proper warning of any danger of which they knew or should have known."

Similar statements were made in *Hendren v. Ken-Mar Air Park, Inc.,* 191 Kan. 550, 382 P.2d 288; and *Peavey v. City of Miami,* 146 Fla. 629, 1 So.2d 614.

The District Court Was Justified in Finding That the Defendant Was Negligent and That This Negligence Was the Proximate Cause of the Accident.

This case was tried to the court, sitting without a jury, which concluded upon the evidence and as findings of fact that the failure to more clearly delineate the usable from the unusable parts of the airport rendered the same unsafe in the absence of any warning. The court also found as a fact that no warnings were given and concluded that the defendant was guilty of negligence, which was a proximate cause of the accident. The appellant complains of these findings, largely upon the basis of his own testimony to the effect that only 135 feet in width of the entire airport was usable as a runway, and upon the supporting testimony of Mr. Carkeek, a long-time friend and former business partner of the defendant. (Tr. 217.)

Even if we assume these facts to be true, they cannot absolve the defendant from negligence without a showing that the plaintiff knew or should have known of this condition. Mr. Crooker admits that he placed no markings showing the boundaries of the runway, and that he gave no warning to the plaintiff. The need for such markers or warning is most vividly demonstrated by the testimony of Mr. Cantwell, the independent and unbiased FAA inspector. He made a visual inspection of the field and could not distinguish between the so-called "usable" and "unusable" portions except in the portion indicated in his map at the extreme south end. (Plaintiff's Exhibit No. 2.) Certainly his testimony, with that of the plaintiff, was sufficient to justify the conclusions of the court.

The court found that the plaintiff was guilty of negligence in taking off under the existing weather conditions and with the existing load, but he concluded that this negligence was

not a proximate cause of the accident, and that the defendant's negligence was a proximate cause. While we may disagree with the court's conclusion that the plaintiff was negligent, it is our position that all of these decisions are peculiarly within the province of the trier of the facts, and should not be reversed on appeal.

There is ample support for the court's conclusions on the question of proximate cause. The court found that the plaintiff would have had no difficulty in bringing his airplane to a stop without damage, except for the obstructions in the runway. Accordingly, he found that the plaintiff was in no different position than he would have been if he had landed at the airport and encountered such obstructions.

The situation presented here is among those contemplated by section 468 of the *Restatement of Torts,* 2nd Ed.:

> "The fact that plaintiff has failed to exercise reasonable care for his own safety does not bar his recovery unless his harm results from one of the hazards which make his conduct negligent."

In the comment after this section, at page 518, the following observations are made:

> "c. There is a difference to be noted between negligence and contributory negligence. Where the negligence of a defendant creates a risk of a particular harm, occurring in a particular manner, and the same harm is in fact brought about in another manner, through the operation of some intervening force which was not one of the hazards making up the original risk, the defendant normally is not relieved of responsibility by the intervention of the force, and is liable for the harm. (See § 442 A and Comments.) *But where the negligence of the plaintiff creates a risk of a particular harm to him, occurring in a particular manner, and the same harm is in fact brought about by the intervention*

> *of a force which was not one of the original hazards, the plaintiff is not barred from recovery.* This difference is to be attributed to the more restrictive attitude of the courts toward contributory negligence, as compared with negligence, and their tendency to confine it within somewhat narrower limits." (Emphasis supplied.)

In the very recent case of *Stahl v. Farmers Union Oil Co.,* 145 Mont. 106, 399 P.2d 763, the Montana Supreme Court said:

> "Contributory negligence is not established until causal relationship between it and the injury is shown."

In many other cases the Montana court has emphasized the fact that a showing of contributory negligence is not sufficient to preclude recovery, without a further showing of proximate cause. While these questions were properly held in those cases to be matters for the jury to determine, the facts in several of those cases bear similarity to those presented here, and they demonstrate the concern of the Montana court about the existence of proximate cause in such situations. In *Leichner v. Basile,* 144 Mont. 141, 394 P.2d 742, the plaintiff fell down hallway steps at the Bella Vista Club in Billings. The lower court had instructed the jury as follows:

> "Contributory negligence is negligence on the part of the person injured which cooperating in some degree with the negligence of another helps in proximately causing the injury of which the plaintiff thereafter complains."

The Supreme Court held that the giving of this instruction was error prejudicial to the plaintiff, stating that the use of these words "was not a proper standard as it must contribute immediately and as a proximate cause."

The court then quoted at length from *Wolf v. O'Leary, Inc.,* 132 Mont. 468, 318 P.2d 582. In that case the plaintiff was riding with her husband on a highway near Billings under very adverse weather conditions when the automobile struck an excavation placed in the highway by the defendant. The court reversed a judgment entered upon a verdict for the defendant, basing its decision upon the giving of a similar instruction to the jury. We quote from the opinion at page 473:

> "In Beach, Contributory Negligence (2d ed.) section 26, pages 31, 32, the author points out that for contributory negligence to be available as a defense 'There must be not only negligence on the part of the plaintiff, but *contributory* negligence, a real causal connection between the plaintiff's negligence must *substantially* contribute to produce the injury, in order to avail the defendant anything, and also that it must not only concur in the transaction, but also cooperate in producing the injury. * * * So also there is a line of cases to the effect that, when the plaintiff, though negligent, could not, by the exercise of ordinary care, have escaped the consequence of the defendant's negligence, he may recover.' This statement is supported by the Montana cases cited above."

In *Tiddy v. City of Butte,* 104 Mont. 202, 65 P.2d 605, the plaintiff was injured when he fell in an excavation near a city sidewalk. In affirming a judgment for the plaintiff, the court said:

> "In considering the question of contributory negligence, it is necessary to take into account the proximate cause of the injury in connection with the contributory negligence alleged. This court held in *Fulton v. Chouteau County Farmers' Co.,* 98 Mont. 48, 37 Pac. (2d) 1025, that to bar recovery by plaintiff in a personal injury action on the ground of contributory neg-

ligence, it is not sufficient that he was negligent; it is only when his negligence contributed to the injury at the time it was inflicted and was a proximate, and not a remote, cause of the injury that he cannot recover. We think the negligence of the defendant is shown in both the defective sidewalk and in defendant's not protecting the public against the excavation contiguous thereto, and, as to plaintiff's contributory negligence, one is not required to devote his time and attention to discover defects in the municipal sidewalks on which he travels. He has a right to assume they are in a reasonably safe condition, but he may not close his eyes to obvious danger. (*Nilson v. City of Kalispell,* 47 Mont. 416, 132 Pac. 1133.)"

The foregoing authorities were cited in the opinion of the district court, as was *Prosser, The Law of Torts,* 431 (3d Ed., 1964). In that opinion, the court observed that it made no difference whether the "particular risk" approach of Prosser and the American Law Institute, or the "proximate-remote" approach of the Montana Supreme Court, is used. He found that under either approach the plaintiff's negligence did not bar recovery.

The Court's Decision on the Question of Proximate Cause Finds Support in the Evidence, and Thus Should Not Be Reversed on Appeal.

We submit that the decision with respect to proximate cause, in Montana as elsewhere, is a jury question, or a question for the trier of the facts if there is no jury, in all cases where there is supporting evidence. This is apparent from the Montana cases which were previously cited in this brief. This being the case, we contend that the appellant has no standing to ask for a review of that decision.

No. 21,900

IN THE

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

OTIS CROOKER,

Appellant,

-vs-

WARREN GRAFT,

Appellee.

Appeal from the United States District Court for the District of Montana, Helena Division

PETITION FOR REHEARING

SMALL & CUMMINS and
CARL A. HATCH
300 Fuller Avenue
Helena, Montana

Attorneys for Appellant

No. 21,900

IN THE

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

OTIS CROOKER,	)
	)
Appellant,	)
	)
-vs-	)
	)
WARREN GRAFT,	)
	)
Appellee.	)

Appeal from the United States District Court for the District of Montana, Helena Division

PETITION FOR REHEARING

The appellant above-named respectfully petitions this Honorable Court for a rehearing of the appeal in the above-entitled cause, and in support of this petition, represents to the Court as follows:

Contrary to our argued position that the appellee, Warren Graft, was negligent in various particulars in aborting his takeoff, and that such negligence was the

immediate and proximate cause of the accident, the Court, by its decision here, has held that any such negligence was not the proximate cause of the accident, and that there is no indication that the plane was in any manner out of control at the time it landed as a result of the aborted takeoff. Thus this Court has obviously concluded, as did the District Court, that appellee Graft had his plane under complete control; and that his rollout in its initial stage was no different from that which might have followed a normal landing. In this connection, the District Court pointed out that:

> "In the excitement and emergency of an unplanned landing he might have executed a faulty touchdown. His negligence would have barred recovery for damages arising from any of these events. Here, however, plaintiff was in no different position than a pilot who had arrived at that place on the runway without negligence and was rolling to a stop."

This final determination by the Court of the factual situation up to that point has been considered and determined, and we do not propose here to argue further any such matters. However, we believe that this necessarily creates an additional situation which has not heretofore been adequately presented nor considered by the Court, to-wit:

Assuming now that appellee, Graft, made a normal landing and started on a normal rollout and, as found by the

District Court, that he was not laboring under any undue excitement as a result of the emergency or unplanned landing, which in any manner caused him to make a faulty touchdown, then we must consider him in the same position as any experienced pilot having made a normal landing and commenced a normal rollout. Considered in this light, then we respectfully submit that appellee, Graft, was himself negligent in failing to observe that which was clearly in front of him to have been seen had he been looking.

As pointed out by the Findings and Opinion of the District Court, the line of demarcation between the usable strip and the unusable portion was not very clearly apparent at the north end of the field, but "at the south end, there was a noticeable berm of soil and substantial differences in the appearance of the weeds," establishing such line of demarcation. This accident occurred at the south end of the field where such line of demarcation was clearly apparent. This is substantiated by the pictures, Exhibits Nos. 6 and 7, which are before the Court. Therefore, and in the light of the Court's present decision, we sincerely believe that there is now to be considered a further element of negligence on the part of appellee, Graft, which led directly to the occurrence of this accident, to-wit, his failure to observe the berm along the west edge of the landing strip, which (even in the absence of artificial markers) was clearly apparent had he been looking. If his landing was normal and he was suffering under no stress of an emergency landing, then there could have been no valid reason for

him to have run off the west edge of the runway if he had been exercising reasonable care. Such negligence should bar any recovery here, regardless of any and all other preceding negligent acts or omissions on his part, which the Court has determined were not the proximate cause of the accident.

In such situation, the actions of appellee, Graft, were clearly subject to application of the rules frequently enumerated by our courts with reference to keeping a proper lookout ahead. Thus, in the case of *Autio v. Miller*, 92 Mont. 150, 11 P.(2d) 1039, it was held (quoting syllabus):

> "The driver of an automobile must not only look straight ahead but laterally ahead as well, and he is presumed to see that which he could see by looking; the duty to keep a lookout includes the duty to see what is in plain sight. . . ."

See also, *Koppang v. Sevier*, 106 Mont. 79, 75 P.(2d) 790, and 38 Am. Jur. (Negligence), Sec. 191, p. 868.

For the foregoing reasons, we respectfully submit that this Petition for Rehearing should be granted.

SMALL & CUMMINS and
CARL A. HATCH

By: Floyd O. Small
Attorneys for
Appellant

STATE OF MONTANA)
ss.
County of Lewis and Clark)

FLOYD O. SMALL, being first duly sworn on oath, certifies and says:

That he is one of the attorneys for Appellant in this cause; that he makes this certificate in compliance with Rule 23 of the rules of this Court; that in his judgment the within and foregoing petition for rehearing is well founded and is not interposed for delay.

Floyd O. Small

SUBSCRIBED AND SWORN to before me at Helena, Montana, this _____ day of May, 1968.

Betty V. Alke
NOTARY PUBLIC for the State of Montana. Residing at Helena, Montana. My Commission expires November 27, 1970.

(SEAL)

Service of the foregoing PETITION FOR REHEARING and receipt of a copy thereof are hereby acknowledged this _____ day of May, 1968.

RISKEN & SCRIBNER

By: _____
Attorneys for Appellee

NO. 21901

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

ROBERT EDWARD GRAVENMIER,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLEE'S BRIEF

APPEAL FROM
THE UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA

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TOPICAL INDEX

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IN THE UNITED STATES COURT OF APPEALS

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ROBERT EDWARD GRAVENMIER,

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Appellee.

APPELLEE'S BRIEF

I

JURISDICTIONAL STATEMENT

Appellant, Robert Edward Gravenmier (hereinafter referred to as "Gravenmier"), was indicted by the Federal Grand Jury for the Central District of California on February 15, 1967 [C.T. 2]. 1/ The indictment contained two counts alleging that on December 21, 1966, Gravenmier robbed Home Savings and Loan Association of Los Angeles, a Federally insured savings and loan association, and that on January 20, 1967, Gravenmier robbed the Crocker-Citizens National Bank, a bank insured by the Federal Deposit

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1/ "C.T." refers to Clerk's Transcript.

Insurance Corporation, in violation of Title 18, United States Code, Section 2113(a) [C. T. 2-3].

On February 20, 1967, Gravenmier was arraigned in Los Angeles, California, and at that time Mr. Bernard Winsberg was appointed counsel for Gravenmier. At the arraignment Gravenmier entered a plea of not guilty to both counts of the indictment and the matter was assigned to the Honorable Manuel L. Real, United States District Judge, for all further proceedings [C. T. 4]. On February 21, 1967, Gravenmier, with his counsel, appeared before Judge Real and his trial was set to commence on March 21, 1967 [R. T. 9]. 2/

On March 21, 1967, Gravenmier and his counsel appeared before the Honorable Manuel L. Real for jury trial. At this time Gravenmier, through his counsel, made an oral motion for a continuance of the trial [R. T. 6-8], and the motion was denied [C. T. 21 and R. T. 11]. The jury was impanelled and the trial commenced on March 21, 1967. On March 22, 1967, the trial was concluded. The jury returned a verdict finding Gravenmier guilty as charged in Count Two of the Indictment and announced that they were deadlocked and could not reach a decision concerning Count One of the Indictment [C. T. 52]. The Court rescheduled the case for March 27, 1967, for trial setting and re-trial of Count One [C. T. 52]. On March 27, 1967, the United States Attorney moved, and the Court ordered Count One of the Indictment dismissed [C. T.

2/ "R. T." refers to Reporter's Transcript.

54]. On April 24, 1967, Gravenmier was sentenced on Count Two of the Indictment to a term of 20 years in the custody of the Attorney General, said sentence to run concurrently with the sentence imposed in Case No. 36582-CD, in the United States District Court, Central District of California, then on appeal [C.T. 56].

On April 24, 1967, Gravenmier filed a notice of appeal [C.T. 55].

The jurisdiction of the District Court was based upon Section 2113(a) of Title 18, United States Code. This Court has jurisdiction to review the judgment of the District Court pursuant to Title 28, United States Code, Sections 1291 and 1294.

II

SPECIFICATION OF ERRORS

1. Did the Court abuse its discretion in denying defendant's motion for a continuance, when said motion was made on the date of the trial, and allegedly for the purpose of locating witnesses whose identity was questionable and where there was no showing that these witnesses could be located?

2. Was the defendant deprived of effective representation by counsel so as to constitute a violation of his Sixth Amendment right to effective counsel, by the fact that certain alibi witnesses

were not produced at the trial?

III

STATEMENT OF FACTS

The First Count of the Indictment alleged that on December 21, 1966, Gravenmier robbed the Home Savings and Loan Association of $1,901.00. The Second Count of the Indictment alleged that on January 20, 1967, Gravenmier robbed the Crocker-Citizens National Bank of $1,102.00 [C.T. 2-3].

On February 20, 1967, Gravenmier was arraigned and the trial was set for Tuesday, March 21, 1967 [C.T. 4]. On or about March 14, 1967, counsel for plaintiff filed a trial memorandum with affidavit of service of said memorandum on defendant's counsel. On March 21, 1967, all parties appeared for jury trial before the Honorable Manuel L. Real, United States District Judge. At this time counsel for the defendant made an oral motion for a continuance. Counsel admittedly had failed to notice this motion or file any affidavits in support thereof as required by the local rules of the United States District Court, Central District of California [R.T. 8]. However, the defendant's counsel did state that he had orally notified the Assistant United States Attorney on Thursday, March 16, 1967, that he might seek a continuance. At that time Mr. Winsberg was notified that his motion for a continuance would be opposed [R.T. 9].

In support of his motion for a continuance defense counsel

stated that he had several cases set for trial on the same date and that all other defendants pled guilty [R. T. 6]. Counsel represented that prior to trial he had prepared a list of potential witnesses from names given by the defendant Gravenmier and that he had attempted to locate these persons [R. T. 7]. However, on inquiry from the court, counsel was vague as to what he had done to locate them, stating that he had attempted to call the one witness whose identity was known [R. T. 10]. Counsel also stated that he had relied upon the family and friends of the defendant as was his usual practice in preparing an indigent case, to locate alleged witnesses. Mrs. Gravenmier had spoken to one witness, but that witness would not come forward for an interview [R. T. 10]. Counsel admitted that he did not avail himself of the offices of the United States Attorney to locate these individuals, because in his opinion, it was advisable to withhold their names until they had been interviewed and their testimony evaluated [R. T. 11]. Counsel did state that when he was speaking of these witnesses, he was referring to three John Does and one individual whose name was known [R. T. 7]. Upon inquiry from the court, counsel stated that if he were to receive a continuance he would attempt to locate the witnesses and upon failing to do so, then, and only then would he be willing to disclose their identity to the United States Marshal or the United States Attorney for service of process as proof of good faith [R. T. 9-10]. The court denied the motion for a continuance on the grounds that because one of the witnesses had been contacted and would not come forward it appeared that there was not a sufficient showing

that the witnesses could ever be contacted for the trial [R. T. 11].

The Government first presented evidence to show that on December 21, 1966, Gravenmier did rob Home Savings and Loan Association. The evidence of this robbery consisted of four employees who positively identified Gravenmier as the man who robbed their place of employment [R. T. 70, 121, 145, 169]. On this count the jury was deadlocked and a mistrial was declared [C. T. 52]. The Government utilized the testimony of three witnesses to establish that on January 21, 1967, Gravenmier robbed the Crocker-Citizens National Bank as charged in the Indictment [R. T. 197, 201-202, 222-223 and 233]. The jury did find Gravenmier guilty as charged in the Indictment for this robbery [C. T. 52].

The defense consisted of Mrs. Gravenmier, wife of the defendant, testifying that defendant could not have robbed the Home Savings and Loan Association on December 21, 1966, because he was in her presence during all pertinent times. Mrs. Gravenmier testified that she was with the defendant and some people named Benny, Don and Kenny, during the time of this robbery [R. T. 248]. However, Mrs. Gravenmier claimed that she could not recall anything concerning the events of January 20, 1967, the date of the robbery of Crocker-Citizens Bank [R. T. 250]. Mrs. Gravenmier testified that she had no knowledge of the whereabouts of the defendant on that date [R. T. 250]. On cross-examination Mrs. Gravenmier testified that she had talked to a person named Don subsequent to her husband's arrest, and that

they discussed the case [R. T. 256]. Mrs. Gravenmier claimed that she had not seen Benny subsequent to her husband's arrest [R. T. 256].

At the conclusion of the trial on March 22, 1967, the jury returned a verdict of guilty on Count Two of the Indictment [C. T. 51]. The jury informed the court that they were unable to reach a decision on the guilt or innocence of Gravenmier on Count One of the Indictment, and a mistrial was declared [C. T. 52]. On March 27, 1967, pursuant to the motion of the United States Attorney, Count One of the Indictment was dismissed [C. T. 54]. On April 24, 1967, Gravenmier was sentenced to the custody of the Attorney General for a period of 20 years, said sentence to run concurrently with the sentence imposed in an earlier case then on appeal.

IV

ARGUMENT

A. THERE DOES NOT EXIST AN ABUSE OF THE TRIAL COURT'S DISCRETION IN DENYING A CONTINUANCE WHEN APPELLANT FAILED TO ESTABLISH THE IDENTITY OF ALLEGED WITNESSES, THE NATURE OF THEIR TESTIMONY, AND FAILED TO SHOW ANY PROBABILITY THAT THESE WITNESSES COULD BE PRODUCED WITHIN A REASONABLE TIME.

"The matter of continuance is traditionally within the discretion of the trial judge, and it is not every denial of a request for more time that violates due process even if the party fails to offer evidence or is compelled to defend without counsel. Avery v. Alabama, 308 U.S. 444. Contrariwise, a myopic insistence upon expeditiousness in the face of a justifiable request for delay can render the right to defend with counsel an empty formality. Chandler v. Fretag, 348 U.S. 3. There are no mechanical tests for deciding when a denial of a continuance is so arbitrary as to violate due process. The answer must be found in the circumstances present in every case, particularly in the reasons presented to the trial judge at the time the request is denied."
[Emphasis supplied.]

Ungar v. Sarafite, 376 U.S. 575 (1964), at 589.

The standard above mentioned for determining the scope of review on the question of whether a continuance should have been granted or denied is well established in the law of the Federal courts. The authorities are overwhelming in holding that the decision of the trial court will not be reversed unless it is clearly shown that there has been an abuse of the trial court's discretion in denying a continuance. See Isaacs v. United States, 159 U.S. 487, at 489 (1895); Joseph v. United States, 321 F. 2d 710 (9 Cir. 1963).

However, the present case presents an added obstacle in that there exists an effort to supplement the record with excerpts from certain letters written by Mr. Winsberg and Gravenmier, showing the existence of alibi witnesses. It is respectfully submitted that in reviewing the trial court's decision in this case, the appendix to the appellant's opening brief be stricken as being beyond the record and not a valid consideration to determine whether or not there exists an abuse of discretion. The courts are uniform in refusing to consider matters that are not properly part of the record of the case as designated by Rule 39, Federal Rules of Criminal Procedure. See United States v. Nash, 342 F. 2d 326 (6 Cir. 1965), and Smith v. United States, 343 F. 2d 539 at 541 (5 Cir. 1965).

The primary error in the appellant's contention that there is an abuse of discretion is found in the fact that at no time in the record of these proceedings were the alleged witnesses identified. In fact, they were specifically referred to by counsel for appellant

as three John Does and one person whose name was known [R. T. 7]. Counsel for appellant did state that one of the witnesses had been contacted by appellant's wife, and this witness had promised to come to Mr. Winsberg's office for interview. However, this witness apparently had no desire to testify in the trial, because he failed to meet with Mr. Winsberg and he could not be found [R. T. 10].

This obvious lack of ability to identify the alleged alibi witnesses clearly presents a sufficient basis in fact for the trial judge to exercise his discretion and deny the motion for a continuance. As the court held, the motion for a continuance is denied because it appears that it was not known whether the witnesses would ever be contacted [R. T. 11]. This precise ruling is found in Heflin v. United States, 223 F. 2d 371 (5 Cir. 1955), at 375, reversed on other grounds, 358 U. S. 415 (1959), wherein the court stated:

> "In the absence of a showing that appellant could probably locate and serve these witnesses within a reasonable time, it was within the trial court's discretion to refuse a continuance."

In another case with facts strikingly similar to those now before this Court it was held that there was no abuse of discretion to deny a motion for a continuance when the defendant was unable to locate two witnesses and that the third witness was either unable or unwilling to assist the defendant. See United States v. Hutchinson, 352 F. 2d 404 (4 Cir. 1965).

The rationale behind the above mentioned decisions is readily apparent when one considers the requirement that cases be brought to trial within a reasonable period of time and that there be some regulation of the court's own trial calendar. This is especially so when one considers that a trial cannot be continued forever in a vain attempt to contact witnesses whose identity is not even established by the defendant. Naturally, the trial court has the responsibility of protecting the rights of a defendant and allowing them to prepare their case adequately for trial. However, when a defendant has had four weeks to prepare a case for trial, and the witnesses have not been identified within that period of time, and without showing any facts that would indicate that they could be contacted, it cannot be said that there was an abuse of discretion in denying the motion for a continuance based upon those facts.

A second question is presented by appellant's contention that there was an abuse of discretion in not granting a continuance, and that is whether it was sufficiently shown in the record what testimony these witnesses would give which would necessitate a continuance. It is incumbent upon defendant to make an adequate showing as to the materiality of the testimony when seeking a continuance. See Sanchez v. United States, 311 F. 2d 327 (9 Cir. 1962) at 332.

The only representation provided the court as to the expected testimony was when counsel stated "According to the information supplied to me," [these witnesses] "establish the

existence of alibi." [R.T. 8]. There was no specific representation as to whether these alleged witnesses would establish an alibi for one or both counts of the Indictment. As the Court may recall, the first robbery was on December 21, 1966, and the second robbery was on January 20, 1967. The appellant was convicted only for the robbery occurring on January 20, 1967. The wife of appellant did provide an alibi for the first robbery. Mrs. Gravenmier also stated that Don, Kenny and Benny could corroborate this alibi [R.T. 248]. She testified on cross-examination that she had talked to a man named Don about this case [R.T. 256]. However, Mrs. Gravenmier was unequivocal in her answer that she had absolutely no knowledge of her husband's whereabouts for the robbery of January 20, 1967 [R.T. 250]. From this it would appear to follow that neither Mrs. Gravenmier nor the elusive Don had any knowledge of Gravenmier's whereabouts on the date of the robbery for which he was convicted. From the obvious lack of any showing in the record it would appear that appellant has clearly failed to establish the facts showing the materiality of the testimony of the missing witnesses in that there is no showing that they would provide an alibi for the robbery for which Gravenmier was convicted and is presently incarcerated.

Considering that the trial court's decision must be tested only on whether or not it has in fact abused its discretion in granting or denying a continuance, it is respectfully submitted that the record is overwhelming in support of the trial court's decision to deny a continuance. This determination can only be

made from the facts presented at the time the motion was made. The necessity of regulating the trial calendar and respecting a defendant's rights must be considered in the light that at the time this motion was brought a jury panel was present, the Government's witnesses were present, and the defendant had failed to give any proper notice that the motion was going to be brought [R. T. 8]. Once the motion was made orally, the lack of any specificity must be attributed to a lack of knowledge of any facts because Gravenmier was present and if the identity of witnesses was known to him at that time he could have supplied that information to Mr. Winsberg. Unfortunately, appellant's present counsel appears to ignore the fact that the identity or testimony of these alibi witnesses could have been wishful thinking and it was not until after conviction that added thought was put into appellant's efforts to escape his just incarceration.

Appellant relies heavily on Scott v. United States, 263 F. 2d 398 (5 Cir. 1959), where the missing witness was one named Bard who had been a codefendant, and in this case the defense counsel fully established that he had done all that could be required to obtain Bard's appearance at the trial. Furthermore, in contrast to the present case, the identity of the witness was known, and his intimate involvement was well established by the fact that he had been indicted for the same transaction. This is not at all similar to a case where the identity of the witnesses is questionable, that only a bare conclusion is given as to the materiality of their testimony, and that the only known witness had appeared unwilling

to come forward and testify.

B. A REVIEW OF THE RECORD CLEARLY ESTABLISHES THAT APPELLANT'S COUNSEL WAS OF SOUND QUALITY AND THAT THE ALLEGED ERROR OF INEFFECTIVE COUNSEL IS WITHOUT MERIT.

Appellant alleges that he was denied his constitutional right to effective counsel, because his counsel did not produce alleged alibi witnesses at the trial. Again, it is respectfully submitted that this question must be determined by the record of the trial as submitted to the Court of Appeals. See United States v. Nash, supra, and Smith v. United States, supra. Appellant has provided selected excerpts from letters written after the conviction by Gravenmier and his trial counsel, Mr. Winsberg. These letters are utilized to supplement the record and should be stricken. The Court of Appeals is not the proper forum to make an evidentiary decision on the truth of the statements asserted therein.

The frequently articulated test used to determine whether or not a defendant has received effective counsel is whether the " . . . attorney's conduct was so incompetent that it made the trial a farce." Dodd v. United States, 321 F. 2d 240 (9 Cir. 1963); Stanley v. United States, 239 F. 2d 765 (9 Cir. 1957). In making this determination, the Court is to review the entire record to determine whether counsel had done a workmanlike job. Sherman v.

United States, 241 F. 2d 329 (9 Cir. 1957), at 336. As it was stated in Brubaker v. Dickson, 310 F. 2d 30, at 37 (9 Cir. 1962):

> "This does not mean that trial counsel's every mistake in judgment, error in trial strategy, or misconception of law would deprive an accused of a constitutional right. Due process does not require 'errorless counsel, and not counsel judge ineffective by hindsight, but counsel reasonably likely to render and rendering reasonably effective assistance.' Determining whether the demands of due process were met in such a case as this requires a decision as to whether 'upon the whole course of the proceedings,' and in all the attending circumstances, there was a denial of fundamental fairness; it is inevitably a question of judgment and degree."

A review of the entire record in this case clearly shows that lack of the alibi witnesses did not reduce this trial to a mockery of justice or a farce. As Mr. Winsberg represented to the court, he knew the identity of only one person who was a potential alibi witness. That Mrs. Gravenmier had contacted this witness and that the witness was apparently not willing to come forward [R. T. 7, 10]. The record also shows that Mr. Winsberg did attempt to telephonically contact this person, without success [R. T. 10].

It is not difficult to understand Mr. Winsberg's reluctance to provide the United States Attorney with the name of a possible

witness, when there could well exist reasons to believe the witness did not want to testify. There is always the possibility that the witness may possess damaging testimony. An example of damaging testimony would be if the witness had participated in the robbery as a driver or in some other role. Also, as a matter of trial strategy, Mr. Winsberg knew that Mrs. Gravenmier would provide an alibi for the December 21, 1966, robbery. An appraisal of the Government's evidence will show that four employees positively identified Gravenmier, and that there existed photographs of the robbery [R.T. 70, 121, 145, 169; R.T. 68-69]. However, on the second robbery, there were fewer identification witnesses and therefore an attorney could hope to discredit the identification. If a second alibi was presented, this would tend to weaken the credibility of the first alibi witness because the coincidence of two alibis would leave the witnesses more vulnerable to attack and the jury may reject all evidence.

Another factor that appellant's counsel apparently fails to appreciate is that Mr. Winsberg could have known facts that would clearly establish that the alibi would be a fabrication. Mr. Winsberg has no duty to consciously utilize perjured testimony, and in fact he would develop his own problems if he became involved in the use of perjured testimony. It appears patently unfair to attack the competence of Mr. Winsberg for not producing these alleged alibi witnesses, when a number of sound reasons exist for conducting the trial in the manner shown by the record.

As previously mentioned, the test for competency of counsel

requires a review of the entire record to determine whether counsel did a workmanlike job, or if his efforts were of such low caliber to reduce the trial to a farce. Sherman v. United States, supra. A review of the Reporter's Transcript will show that Mr. Winsberg was very skilled in attacking each identification witness, and his overall demeanor and conduct of the trial is a credit to the legal profession. While we cannot know precisely what Mr. Winsberg thought when he made a number of strategy decisions, the record clearly demonstrates that he is an attorney of experience and skill. From this record, there exists substantial evidence to believe that Mr. Winsberg's strategy decisions were soundly made and in the best interest of his client. It is interesting to note that the entire record is void of any fact indicating that Mr. Gravenmier was dissatisfied with his counsel.

It is respectfully submitted that to determine that appellant was deprived of effective counsel would be contrary to the test established for determining effective counsel, and would establish a dangerous precedent. The danger would be that if counsel's strategy can be judged by hindsight, there could hardly be a conviction that would not be endangered. Also, to explain every strategy decision in a trial record would penetrate into the private conferences between an attorney and his client. The conduct of counsel in this trial is shown by the record to be of a high standard and appellant did receive full and competent legal counsel throughout the trial.

Appellant argues at great length that the facts of the present

case are strikingly similar to the facts found in MacKenna v. Ellis, 280 F. 2d 592 (5 Cir. 1960); reh. den. and opinion modified 289 F. 2d 928 (5 Cir. 1961), cert. den. 368 U.S. 877 (1961). A number of significant factual differences exist between the plight of Mr. MacKenna and that of Gravenmier. In the first place, MacKenna objected in open court to the appointment of counsel when he was making arrangements to hire counsel (Id. at 595, 598). The length of time allowed for preparation of the trial differs greatly. MacKenna first appeared in court on September 28, 1956, and the trial was scheduled for October 3, 1956. However, the trial was advanced to October 2, 1956, without prior notice to MacKenna. In the present case Gravenmier had approximately thirty days' notice of trial as opposed to MacKenna's six. Thirdly, Gravenmier's alibi witness had been contacted and was not willing to come forward [R. T. 7], whereas, MacKenna's witnesses were all known and were willing to testify. MacKenna was able to provide affidavits from his alibi witnesses showing their testimony, but no one has ever submitted any statement under oath concerning Gravenmier's alleged alibi witnesses. Fourth, Gravenmier's silence certainly indicates a satisfaction with counsel's conduct of the trial, whereas, MacKenna protested to the court for a continuance and counsel of his choice.

Based upon the aforementioned facts, it is submitted that the MacKenna case, supra, does not support appellant's position.

C. THE APPELLANT'S ATTACHMENT OF THE EXCERPTS OF CERTAIN LETTERS TO THE BRIEF FOR THE PURPOSE OF CORROBORATING CERTAIN ALLEGATIONS IS OBJECTED TO AND SHOULD BE STRICKEN AS BEING IN VIOLATION OF THE RULES OF THE COURT AS NOT CONSTITUTING A VALID PART OF THE TRIAL RECORD IN THIS CASE.

The appellant has filed an appendix to this brief which contains certain excerpts of letters written by Mr. Winsberg and Gravenmier subsequent to the conclusion of the trial. The attempt to supplement the brief in this fashion is objected to and the appendix should be stricken. It appears patently unfair to attempt to corroborate allegations against the trial court's handling of this case by submitting portions of letters which constitute hearsay from the appellant and his former trial counsel. There is no way to determine what the additional portions of these letters say and it appears that a number of the quotes used show that they are not in context. Furthermore, the allegations that are presented in these excerpted letters are not statements that were made under oath, they are not statements that were brought to the attention of the trial court and their only obvious purpose is an attempt to persuade the appellate court that the allegations do have merit, because the record of the trial is void of any support for appellant's contentions.

Rule 39 of the Federal Rules of Criminal Procedure states:

"(b). The Record on Appeal.

"The rules and practice governing the preparation

and form of the record on appeal in civil actions shall apply to the record on appeal in all criminal proceedings, except as otherwise provided in these rules."

A review of the Federal Rules of Criminal Procedure reflect that there is no exception authorizing an appellant to file portions of letters written by the appellant to his attorney as representing fact to be utilized in the argument of an appeal. Rule 75(a), Federal Rules of Civil Procedure, defines what documents constitute the record on appeal:

"The original papers and exhibits filed in the District Court, the transcript of the proceedings, if any, and a certified copy of the docket entries prepared by the Clerk of the District Court shall constitute the record on appeal in all cases."

A review of the Federal Rules of Civil Procedure will also show that there is no provision enabling an appellant to take selected portions of letters and enable him to make them a part of a record on appeal.

In Appellant's Opening Brief at page 18, there is an attempt to justify the addition of these letters contending: "But the appellant's allegations of fact outside the record must be considered." However, the authorities cited by appellant to support this alleged proposition of law are not on point because both of these cases were appeals from denials of habeas corpus and the petition filed therein contained the alleged facts of the

constitutional violations. As this Court and appellant are undoubtedly aware, a petition seeking habeas corpus is part of the record for those proceedings. It is respectfully submitted that these cases do not in any way support appellant's contention that he is authorized to file an appendix by placing into evidence the excerpts of certain letters that were written after the conclusion of the trial by appellant and Mr. Winsberg to counsel for the appeal. It is further respectfully submitted, that because of this flagrant violation of the rules of this Court that the statements contained in those letters not be considered, and that they be stricken for the purposes of this appeal. See United States v. Nash, 342 F. 2d 326 (6 Cir. 1965).

However, because these unsworn statements have been presented as an appendix to appellant's brief, appellee seeks leave to comment upon the contents of those letters, but in no way is this to be construed as an acceptance of these letters as a part of the record or a retraction of the contention that these letters should be stricken. The four letters submitted are: (1) Gravenmier's letter dated September 22, 1967; (2) Winsberg's letter dated September 27, 1967; (3) Gravenmier's letter dated January 31, 1968; and (4) Winsberg's letter dated January 30, 1968. It is now apparent from the content of these letters that appellant alleges that certain names were made available that would provide an alleged alibi for Count Two of the Indictment, the count upon which Gravenmier stands convicted. Mr. Winsberg, in open court, stated that he knew the identity of only one of the witnesses and that the others were addressed to as John Does [R. T. 7]. However, in Winsberg's

letter of September 27, 1967, some six months after the conclusion of the trial, it is stated Winsberg was given a name of Kenneth Shea, Benny, and Don Wallin. This letter fails to state what information these individuals could provide for the robberty alleged in Count Two, and in fact they mention a reluctance of Mr. Shea to come forward and testify in the case. Gravenmier's letter dated January 31, 1968, alleges that there does exist alibi witnesses for Count Two, and he identifies these witnesses as a Kenneth Shea, Frank Shea, and a man whose name is unknown to Gravenmier. It must be recalled that Mr. Winsberg in open court and in the presence of Mr. Gravenmier, represented that only one man had been contacted by anyone concerning the testimony in this case, and that person had been contacted by Mrs. Gravenmier. It was further represented to the Court that the man contacted by Mrs. Gravenmier was not forthcoming [R.T. 7 and 10]. If Gravenmier had in fact talked to Kenneth Shea on two occasions, as he now alleges, he certainly could have corrected Mr. Winsberg who could have made that representation to the court and this fact could have been utilized in argument for a continuance, if in fact this did happen. Consistent with Mr. Winsberg's representation in open court that only one witness had been contacted in connection with this case, Mrs. Gravenmier admitted that she had spoken to a man named Don [R.T. 256]. According to Gravenmier's letter of January 31, 1968, Don was not even present and, therefore, could not be an alibi witness on the second robbery. It is readily apparent that Gravenmier and his counsel do not agree on what

persons would provide an alibi for the Second Count of the Indictment.

In addition to the above mentioned contradictions in names and the basic lack of consistency among the letters as to who would be the alibi witnesses for the count upon which Mr. Gravenmier was convicted, a second consideration is respectfully submitted to this Court for consideration. That is, that throughout the trial and to date no one has been willing to make any statement as to Mr. Gravenmier's whereabouts on January 20, 1967, or even to the existence of alibi witnesses under oath either directly in court or by affidavit. This same policy of refusing to put forth any affirmative information about these witnesses and the nature of their testimony has permeated this entire record and should be considered in determining whether or not this is a fabrication. It is also inconceivable that counsel for appellant would assume that excerpts of letters written after the trial should be sufficient to buttress the record, especially when the entire contents of these letters are not disclosed. If this Honorable Court does not follow appellee's request and strike these hearsay, self-serving statements that are beyond the record from appellant's brief, then it should certainly be considered that the inconsistencies contained therein and the obvious reluctance to utilize affidavits or statements under penalty of perjury is sound evidence to indicate that the entire alibi story being put forth by appellant is a fabrication and does not entitle the appellant to relief.

V

CONCLUSION

For the reasons stated in the argument the judgment of the District Court should be affirmed.

Respectfully submitted,

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CERTIFICATE

I certify that, in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

/s/ Dennis E. Kinnaird

DENNIS E. KINNAIRD

No. 21,903

In the United States Court of Appeals for the Ninth Circuit

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

C. W. BROOKS AND G. N. DODGE, CO-PARTNERS, d/b/a BROOKS-DODGE LUMBER CO., RESPONDENTS

On Petition for Enforcement of an Order of the National Labor Relations Board

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

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INDEX

AUTHORITIES CITED

Cases:

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On Petition for Enforcement of an Order of the National Labor Relations Board

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BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

JURISDICTION

This case is before the Court upon the petition of the National Labor Relations Board for enforcement of its order issued against respondents (hereinafter referred to as the Company) on May 23, 1966. The Board's decision and order (R. 18-33, 41-43)[1] are

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[1] References to the pleadings and decision and order of the Board, the Trial Examiner's Decision and other papers re-

reported at 158 NLRB No. 105. This Court has jurisdiction over the proceeding under Section 10(e) of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C. Sec. 151, *et. seq.*).[2] The Company's principal office is located in Montebello, California, where it is engaged in the sale at wholesale of lumber and lumber products. The unfair labor practices occurred in Hanford, California, where the Company formerly maintained a trucking operation. No issue of the Board's jurisdiction is presented.

STATEMENT OF THE CASE

I. The Board's Findings of Fact

a. *Introduction*

Briefly, the Board found that the Company violated Section 8(a)(1) of the Act by interrogating its employees concerning their Union membership.[3] The Board also found that the Company violated Section

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produced as Volume I, Pleadings, are designated "R." References to portions of the stenographic transcript reproduced pursuant to the Rules of this Court are designated "Tr." References designated "GCX" and "RX" are to the exhibits of the General Counsel and the Respondents, respectively. References preceding a semicolon are to the Board's findings; those following are to the supporting evidence.

[2] Relevant statutory provisions are set forth *infra*, pp. 25-29, as Appendix B.

[3] The Union is General Teamsters, Warehousemen, Cannery Workers & Helpers Union Local 94, International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America.

8(a)(3) and (1) of the Act by discharging its driver-employees operating out of Hanford, canceling certain leases covering the trucks they were driving, attempting to remove certain other trucks operated by them to Montebello, and discontinuing its operation in Hanford, all for the purpose of discouraging the employees' union activities. The evidence on which the Board based its findings is summarized below.

b. *The Company's operations*

As noted, the Company's main office from which it wholesales lumber is located in Montebello, a community adjacent to Los Angeles (R. 19; Tr. 11-12). The Company purchases lumber from mills in Northern California and transports it by trucks to its facility in Montebello (R. 19; Tr. 15-16). For this purpose the Company leases a number of trucks from various lessors, the largest of whom was Earl Danell with nine leases (R. 19). Although the leases were not identical, they uniformly provided for rentals based on miles driven, a guaranteed minimum mileage of 75,000 or 85,000 miles yearly, and an initial term of one year, with automatic renewal for yearly periods thereafter, subject to a right of termination upon the giving in some cases of 30-days' notice and in other cases of 90-days' notice. The lessor was responsible for the maintenance and repair of the trucks (GCX 6, 7, RX 4). Four of the Danell leases were dated January 1, 1964; the remaining five bore dates ranging from April 1, 1964 to September 10, 1964 (R. 26, 27; Tr. 141-142, 324-327, GCX 6, 7, RX 4). Three

of the Company's leases with lessors other than Danell had effective dates of January 1, 1964; the dates of the others ranged from March 19, 1964 to June 10, 1964 (R. 27; Tr. 326-327, GCX 7). Danell's trucks were the newest and most efficient of all of the trucks leased by the Company (R. 19, 26; Tr. 224-225).

The Company employed 18-20 employees during the relevant periods to operate its leased trucks (R. 19; Tr. 6-7, 15-16). The drivers assigned to the trucks leased from lessors other than Danell lived and kept their trucks in the Los Angeles area and operated out of the Montebello office (R. 19; Tr. 15-16). Danell, however, had an understanding with the Company that the trucks leased from him would be parked at and operated out of a fuel stop owned by him in Hanford, a town about 225 miles from Los Angeles. The drivers of the Danell trucks, therefore, lived in the Hanford area. The purpose of the understanding was to enable Danell effectively to control the maintenance of the trucks, which was his responsibility under the terms of the lease (R. 19; Tr. 16, 36, 191-192, 194, 218, 223, 347).

The Montebello drivers customarily received their instructions from the Company's assistant manager, Robert Turner, in Montebello, traveled to the mills in the north, obtained the lumber and drove it back to Montebello (Tr. 15-16). Initially, the Hanford drivers also received their instructions in Montebello. After April 1964, Turner transmitted the instructions over the telephone to Danell in Hanford, who in turn relayed them to the drivers (R. 19-20; Tr. 15-16, 37,

76, 114-115, 119-200, 283-285). The Company saved at least one and a half cents per gallon by purchasing its fuel from Danell, and after April or May 1964, it caused all of its trucks to obtain fuel from Danell (R. 20; Tr. 223-224).

c. *Organizational activity begins; the Company interrogates its employees concerning their actions*

In the latter part of November 1964 four Hanford employees, Fugate, Underwood, Cooper and Goodrick, discussed joining a Union. All except Goodrick visited the Union's office and signed membership cards there. Subsequently, Goodrick and four additional Hanford employees, Polston, Tyler, Hite and Wilhite, Jr., also signed cards (R. 20; Tr. 19-20, 41-42, 77, 105-106, 131, 151, 167, 173, 185). On December 3, 1964, the Union sent a letter to the Company in Montebello demanding recognition as the collective bargaining representative of the Hanford employees. The Company never responded to the letter (R. 20; Tr. 22-24, GCX 2).

After the Company received the letter, Assistant Manager Turner called Danell, advised him of the Union's letter and asked him to contact the employees in order to verify the Union's claim that it represented them (R. 20; Tr. 207, 282-283). In the next day or two either Danell or his wife spoke to or telephoned each of the Hanford employees except Goodrick and inquired whether they had joined the Union (R. 20; Tr. 77-78, 132, 137, 152, 167-168, 173-174, 207, 239, 260-262). Danell then telephoned Turner and in-

formed him that all of the drivers with the exception of Danell's two sons, who also drove trucks, had joined the Union (R. 20; Tr. 207, 239-240, 282).

On December 17, the Union's attorney sent another letter to the Company reiterating the Union's demand for recognition. This letter also was never answered (R. 21; Tr. 25-26, GCX 3).

d. ***The Company's response to its employees' organizational efforts; the discharge of the Hanford drivers***

After learning from Danell that the Hanford drivers had joined the Union, Turner told Brooks, one of the owners of the Company, "about the problem that had arisen" as a result of the Union's letter demanding recognition (R. 20; Tr. 280-281). Turner spoke about "trouble keeping these trucks loaded; that possibly there was going to be some changes made; that there was a Union problem . . . ." Brooks then told Turner "not to have anything to say about this thing at all, either to anybody or any Union organizers," and "to close the fuel stop, not to renew the leases on the four trucks that were expiring" (R. 20-21; Tr. 350-351).

Following this decision, the Company began discharging its Hanford drivers. On or about December 21, Goodrick, Underwood, Fugate, Tyler, Cooper and Wilhite received letters terminating their employment, the first two effective immediately and the last four as of the end of the month (R. 21, 23, 24; Tr. 42-43, 80, 108, 153, 168, 185). About December 30, Polston and Hite received termination notices effective

immediately (R. 21; Tr. 133, 174). Between December 7 and February 1, 1965, the Company hired ten new drivers in Montebello while discharging seven, increasing its drivers by three (R. 26; RX 10).

Although most of the discharge letters simply stated that the employees were terminated, reasons were assigned in the cases of Goodrick and Underwood.

1) *The Goodrick discharge*

Gleed Goodrick had begun working for the Company in April 1964 as a Hanford truckdriver (R. 22; Tr. 105). On November 26, 1964, Goodrick visited Danell's office in order to obtain a leave of absence because his sister was ill in San Diego and he wished to be with her. No one was present so Goodrick instructed his wife to call the next day and transmit the message. Mrs. Goodrick then telephoned Mrs. Danell and gave her the information. She responded that it would be "all right." [4]

About two weeks later Goodrick telephoned his wife from San Diego and asked her to tell the Danells that he would be absent for another week. Mrs. Goodrick again called and left the message with one of the Danells' daughters (R. 22; Tr. 106-108, 121-125).

On December 10, Danell sent Turner a note in a letter bearing a postmark of the same date which stated:

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[4] Danell testified that he was informed within three days of Goodrick's departure and the reason for it. He also noted that business was slow and that it was unnecessary for Goodrick to be at work during this period (R. 22, 23; Tr. 202-203, 237, 253-254).

> Goodrick hasn't reported for work in two weeks; nor has he called to explain why. Surely, this is good enough reason to eliminate him (R. 23; Tr. 203-205, 289, RX 5).

On December 19, Goodrick returned to Hanford from San Diego. Two days later he received the letter mentioned above, dated December 18, from Turner reading as follows:

> Since you have not reported for more than two weeks. We consider that you are no longer in our employ (R. 23; Tr. 108-109, GCX 5) (punctuation as in original).

2) *The Underwood discharge*

Jerry Underwood began working for the Company as a truckdriver in August 1963 (R. 23; Tr. 74). Following his interrogation by the Danells on December 8, in which he admitted his union membership, Underwood received no further work assignments. Although he regularly notified Danell that he was available for work, he was informed that there was none. On at least one occasion during this period the truck customarily operated by Underwood was driven to Los Angeles by another employee, McGowan, who worked out of Montebello (R. 24; Tr. 77-80, 98, 134, 174-175).

According to Danell, Underwood was allowing his truck to run low on oil and was not checking the air pressure in his tires. When Danell told Turner about these matters and asked for the removal of Underwood, Turner asked him to put the request in writing

(R. 24; Tr. 200-201). Danell then sent Turner a letter, bearing the date of December 5, reading as follows:

> I have found the 1963 International Tractor, which is leased to you and driven by Jerry Underwood, low on oil on too many occasions. This driver is also negligent in running when part of the clearance lights are out on the trailers. I do not consider him a qualified or safe driver (R. 24; Tr. 299-301, RX 9).

On December 21, Underwood received the previously noted letter from Turner, dated December 18, which stated:

> Due to repeated times of running the truck low on oil and driving with all clearance lights not burning on the trailers, we must terminate your employment as of this date.
>
> The chance of damage to the vehicles and safety is too great for us to assume under these conditions. (R. 24; Tr. 80-81, GCX 4).

Months before his discharge, Underwood had volunteered to perform the fueling and oiling of his truck, which were customarily done by the Danells. And Underwood credibly testified that he had maintained a proper oil level, had not operated without clearance lights, and was never criticized by Danell (R. 24-25; Tr. 81-84, 98-101).

e. ***The elimination of the Hanford fuel stop and the termination of the Danell leases***

Like the drivers, Danell also received a letter on December 21 from Turner, dated December 14, stat-

ing that the Company was not going to extend the four leases which were due to expire on December 31 (R. 21; Tr. 242, RX 7). Shortly after Danell received the letter, Turner told him that the Company intended to discontinue the Hanford fuel stop and that, contrary to its prior understanding with him, it wished to move the five remaining leased trucks from Hanford to Los Angeles (R. 21-22; Tr. 293-295, 318, 319). Rather than move the trucks, Danell in January, 1965 asked for and obtained cancellation of their leases since he could not control their maintenance if they were based in Los Angeles (R. 21; Tr. 192, 246-248, 361-362). At the same time that the Company was terminating Danell's four leases, it allowed three expiring leases covering Montebello-based trucks to renew (R. 26; Tr. 329-330, 355-356, 360).

II. The Board's Conclusions and Order

On the foregoing facts, the Board found that the Company violated Section 8(a)(1) of the Act by interrogating its employees concerning their union membership. The Board also found that the Company violated Section 8(a)(3) and (1) of the Act by discharging the Hanford drivers, including Goodrick and Underwood, because of their union activities, and by eliminating the Hanford fuel stop, canceling four of the leases, and attempting to remove five of the trucks to Los Angeles because of the organizational activities of the Hanford drivers (R. 23, 25, 29, 41-42).

The Board ordered the Company to cease and desist from the unfair labor practices found and from

in any other manner interfering with, restraining or coercing its employees in the exercise of their rights guaranteed under the Act. Affirmatively, the Board's order requires the Company to offer the discharged employees backpay and reinstatement to their former jobs or their equivalent in Hanford if available, and if not, then to such jobs or their equivalent in Montebello, together with necessary traveling and moving expenses (R. 31-33, 42-43).

ARGUMENT

I. Substantial Evidence on the Record Considered as a Whole Supports the Board's Finding That the Company Violated Section 8(a)(3) and (1) of the Act by Discharging the Hanford Drivers, Including Goodrick and Underwood, Eliminating the Hanford Fuel Stop, Cancelling Four of the Danell Leases and Attempting to Remove Five of the Danell Trucks to Los Angeles, All Because of the Union Activities of the Hanford Drivers

A. *The discharges and shut-down were discriminatorily motivated*

The undisputed facts support the Board's finding that the Company discharged its drivers on account of their organizational activities. In a week all of the Hanford drivers joined a Union, which promptly requested recognition. By interrogating its employees, the Company verified that it had, as its officials phrased it, a "Union problem". Co-owner Brooks thereupon instructed Assistant Manager Turner, in his own words, "not to have anything to say about this thing at all, either to anybody or any union organizers," and "to close the fuel stop, not to renew

the leases on the four trucks that were expiring." Within a few days all of the Hanford drivers were discharged, the Danell leases and fuel stop were terminated and the Hanford operation was discontinued. In light of Brooks' conversation with Turner, the discriminatory motivation behind the discharges and shut-down is plain.

With such plain proof of a violation, coupled with the Company's own damaging admissions, the Board might reasonably have rejected the Company's contention that all of its actions were prompted by legitimate business considerations even if the Company's evidence in these respects were uncontradicted. *Bon Hennings Logging Company* v. *N.L.R.B.*, 308 F. 2d 548, 554 (C.A. 9). The Company's evidence, however, wholly failed to support its claims, and this failure strengthens the Board's ultimate conclusion of illegal motive, for as this Court said in *Shattuck Denn Mining Corp. (Iron King Branch)* v. *N.L.R.B.*, 362 F. 2d 466, 470 (C.A. 9), "if [the Board] finds that the stated motive for a discharge is false, [it] certainly can infer that there is another motive. More than that, [it] can infer that the motive is one that the employer desires to conceal—an unlawful motive —at least where, as in this case, the surrounding facts tend to reinforce that inference."

Thus, the circumstances preceding the discharges of Goodrick and Underwood are strongly indicative of illegal intent. Both men had worked for the Company for a considerable period of time prior to their discharges and both were principal organizers of the

Union. Neither had been criticized for his work in the past. Their union sentiments were well known to the Company as a result of the inquiries of the Danells. Following the interrogation Underwood received no further driving assignments, although, contrary to what the Company told him, work was available and was performed by a Montebello driver with his truck. Less than two weeks later, both men were simultaneously discharged without advance warning or notice.

The record leaves no doubt that the separate reasons advanced to explain the Goodrick and Underwood discharges were pretexts. Although Danell's letter to Turner asserted that Goodrick had not called to explain his absence, both Goodrick and his wife testified credibly that Mrs. Goodrick, at her husband's request, notified Mrs. Danell on November 27, that Goodrick would not be available for work for several weeks.[5] Two weeks later, Mrs. Goodrick again called to say that Goodrick would be out for another week. Moreover, Danell testified that Mrs. Goodrick called him on November 29 and explained Goodrick's absence after he attempted to locate him (R. 22, 23; Tr. 202-203, 253-254). Finally, Danell admitted that it was not necessary for Goodrick to be there in the

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[5] The Danells' contrary testimony was specifically discredited by the Trial Examiner (R. 22). The Trial Examiner's resolution of these conflicts will not be disturbed upon review, for it is well settled that "the matter of the credibility of the witnesses is not for this court to pass upon. This is a function of the trial examiner and of the Board." *N.L.R.B.* v. *Thrifty Supply Co.*, 364 F. 2d 508, 509 (C.A. 9).

early part of December since business was slow (R. 23; Tr. 237).

Underwood, who was supposedly discharged for not maintaining the oil level in his truck, testified without contradiction that when he started working, Danell checked the oil, but that he (Underwood) took over that responsibility when he found the level low on a few occasions. Underwood also credibly testified that he did in fact maintain an adequate oil level and that he never operated his truck without clearance lights, an infraction of which he was also accused but about which respondent produced no evidence. On three occasions he parked the truck when the lights were not functioning properly. Danell never criticized Underwood's work prior to his discharge, nor did he ever tell him that he was running low on oil or without proper lights (R. 24-25; Tr. 81-84, 98-101). Danell's testimony on these points was not convincing. Although Danell claimed he kept a written record beginning in August 1964 of the instances in which he discovered that Underwood's truck was low on oil, no such record was produced at the hearing (R. 24; Tr. 201, 251). Danell said variously that he spoke to Underwood "once or twice" and "twice" about his oil, first in September and then either three weeks later or three weeks prior to his discharge. His only comment at those times was "watch" the oil (R. 24; Tr. 201, 235, 252-253). As the Examiner pointed out, in view of the extensive damage which a lack of oil might cause, it is highly unlikely that Danell would have tolerated for a period of at least

four months a persistent failure to check the oil with only one or two casual admonitions about it (R. 25). Finally, while Danell in his testimony claimed that yet another ground which prompted his discharge recommendation to Turner was that Underwood was not maintaining proper pressure in his tires, both his letter to Turner and Turner's letter to Underwood are silent on the matter (R. 25).

In short, the patent falsity of the asserted ground for the discharge in each case clearly shows that it was advanced not because it was the real reason but because the Company thought that, as Danell said in his December 10 letter to Turner about Goodrick, it was "good enough reason to eliminate him." We submit that substantial evidence supports the Board's conclusion that Goodrick and Underwood were discharged because of their union membership and activities.

Substantial evidence, based upon the incidents preceding and surrounding the Company's decision to discharge the remaining Hanford drivers and terminate the Hanford operation, also supports the Board's finding that both were discriminatorily motivated. Certainly, events prior to the mid-December decision to abandon the Hanford facility gave no portent of what was to happen. Although the Company contended that its business had been declining for some time previous to the shutdown, it had renewed the last of the Danell leases only three months before, on September 10 (R. 26; Tr. 353-355). Danell himself was never told prior to the December 21 letter that

his leases were in jeopardy (Tr. 195-198, 226), nor was he given the 90-days' notice called for by his leases (R. 26; Tr. 248, RX 4). The Company's decision was obviously sudden, but the Company can point to no occurrence which would account for the speed with which it was made. The record establishes the explanation—the "Union problem."

The Company's evidence failed to substantiate its claimed business justification for the decision. Thus, although Brooks attributed the decision to close the operation in part to a decrease in both sales and profits in the fall of 1964 (R. 25; Tr. 341, 345), the Company's profit and loss statements for 1964 as compared with 1963 show no significant differences. In fact, although sales were somewhat lower, the profits for the two months preceding the discharges were considerably higher than for the corresponding months in 1963 (R. 25-26, 42; RX 9).[6] Moreover, the lumber business usually experiences a decline in the winter months because of the weather (R. 25-26; Tr. 225, 330-331). Brooks claimed that another factor was a falling off in the building business in Southern California, an industry which he inconsistently testified accounted for 35% and 85-90% of his

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[6] The figures are as follows:

	1963			
	Aug.	Sept.	October	November
sales	$348,817.57	$258,105.83	$328,136.66	$229,081.90
net profit (loss)	$ 5,339.44	$ 2,038.83	$ 1,823.95	($ 1,264.24)
	1964			
sales	$311,654.22	$251,616.66	$290.849.78	$225,318.58
net profit (loss)	$ 3,568.01	($ 467.46)	$ 4,597.65	$ 19.25

sales (Tr. 341, 346). But that contention is refuted by the same figures, for whatever the state of the building business generally, the Company's lumber sales declined only slightly and its profits were higher just before the discharges than in the comparable 1963 months. (R. 26). Furthermore, the simultaneous hiring of three new drivers after the Hanford employees were fired is inconsistent with a claim that business was slow and a retrenchment was needed.

The Company's contention that it shut down the Hanford operation not because the drivers unionized but because business was slow is further refuted by its attempt late in December to transfer five of Danell's trucks to Montebello. The net effect of such a transfer would be to rid it of the drivers, but not of the lease and operating expense. The Company contended that the transfer would have been an economy move, since it had drivers working part time in Montebello who could operate the trucks (Tr. 294-295). But that explanation does not withstand scrutiny. During this period, the Company was hiring drivers in Montebello (R. 26; RX 10) and allowed leases on three trucks operating there to renew (*supra*, p. 10). The absence of any apparent business justification for the decision to transfer the trucks thus supports the Board's finding that the Company's real objective was to get rid of the unionized drivers. *Shattuck Denn Mining Corp.* v. *N.L.R.B.*, *supra*.

The Board properly rejected as unsupported by the evidence the Company's assertion that it was dissatisfied with the Hanford operation for business reasons.

Turner's claim that it was more "practical" to control the trucks from Montebello (R. 28; Tr. 293) is contradicted by the fact that the Company had deliberately switched from Montebello to Hanford control and had maintained such a dispatching procedure for six months prior to the advent of the Union. Turner's further assertion that the Hanford fuel stop, which was located 13 miles from the main highway, was inconvenient for the Montebello drivers (R. 28; Tr. 292, 314) is irrelevant to a consideration of the reason for the termination of the Hanford drivers. As the Trial Examiner pointed out, if the convenience of the Montebello drivers were paramount, the Company could as readily have directed them to fuel elsewhere without dismantling the entire Hanford operation (R. 28). In any event, the Company did not explain why the supposed inconvenience of the Montebello drivers was not offset by the saving of 1½ cents per gallon which the Company effected by purchasing its fuel from Danell.

The Company's claim that it discontinued the Hanford operation for convenience sake is refuted by other evidence. In Hanford the trucks could be parked and maintained at Danell's yard; in Montebello the Company had no garage; and the drivers were forced to park the trucks in front of their homes, have the maintenance performed at nearby filling stations, and telephone the Company's office for instructions (R. 28; Tr. 317-318). Additionally, Danell's trucks were more efficient and on the average 10 years newer than the trucks of the other lessors (R. 26; Tr. 224-

225). Nonetheless, only Danell's leases were terminated; the leases of all the other lessors including those expiring December 31, 1964, were renewed (R. 26; Tr. 329-30).[7]

In sum, the evidence is more than ample to sustain the Board's conclusion that the Company's decision to discharge the Hanford drivers and discontinue the Hanford operation was motivated by the organizational activities of the Hanford employees. *Bon Hennings Logging Company* v. *N.L.R.B.*, *supra; Shattuck Denn Mining Corp. (Iron King Branch)* v. *N.L.R.B.*, *supra; N.L.R.B.* v. *Security Plating Company*, 356 F. 2d 725, 728 (C.A. 9); *N.L.R.B.* v. *Lozano Enterprises*, 318 F. 2d 41, 42 (C.A. 9); *N.L.R.B.* v. *Kalof Pulp & Paper Corporation*, 290 F. 2d 447, 449-451 (C.A. 9). And even if business considerations played a role in the Company's decision, the shut-down and discharges, having been partly motivated by anti-union animus, clearly violated the Act. *N.L.R.B.* v. *Preston Feed Corp.*, 309 F. 2d 346, 350 (C.A. 4); *N.L.R.B.* v. *American Mfg. Co.*, 351 F. 2d 74, 79 (C.A. 5).

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[7] The Company contended that a decision of the California Public Utilities Commission that certain of its leases with lessors other than Danell were unlawful led it to realize that it would have to "move out of the leased truck arrangement." (Tr. 359). This, it contended, explained its decision to terminate the Danell leases. But it continued to lease trucks from lessors other than Danell, including those involved in the PUC matter. Accordingly, the Board properly rejected that explanation of the Hanford shutdown.

B. *The Company's anti-union discharges were not licensed by* Textile Workers' Union v. Darlington Mfg. Co.

Assuming *arguendo* that it closed the Hanford stop in response to its employees' union activities, the Company argued that it could do so lawfully under *Textile Workers' Union* v. *Darlington Mfg. Co.*, 380 U.S. 263. There, the Court held that the closing of one plant in a multi-employer enterprise is unlawful "if motivated by a purpose to chill unionism in . . . the remaining plants." 380 U.S. at 275. But *Darlington* is inapplicable here, because the record does not show that the Company abandoned part of its business within the meaning of *Darlington*. Thus, there is no evidence that the Company transported or sold less lumber after the discharges, or that it ceased servicing any customer, or altered the types or grades of lumber it sold. On the contrary, after closing the Hanford stop, the Company continued as before to purchase and transport lumber from Northern California to its Montebello facility. The significant difference was that having eliminated the unionized drivers, it added additional, presumably non-union, drivers at Montebello and, as the record shows, occasionally had Danell do some hauling (R. 26; RX 10, Tr. 243).

Under these circumstances, the Board rightly found that the Company did not abandon part of its business (R. 29) and could reasonably have inferred that the Company continued to perform the same operations by transferring them to Montebello. This

was the Company's intent: it admittedly sought to transfer five of Danell's trucks to Montebello (Tr. 294-295). The Supreme Court in *Darlington* explicitly stated that, without more, the transfer of work in retaliation for employee union activity violates the Act. *Textile Workers' Union* v. *Darlington Mfg. Co.*, *supra*, 380 U.S. at 272-273. Consequently, respondent's shut-down of its Montebello operation violated the Act (*N.L.R.B.* v. *Preston Feed Corp.*, 309 F. 2d 346, 350 (C.A. 4)) and was not licensed by the *Darlington* decision. See *N.L.R.B.* v. *American Mfg. Co.*, 351 F. 2d 74, 79 (C.A. 5) (subcontacting of trucking operation and layoff of drivers in response to their unionization, violated Section 8(a)(5)); *Local 57, ILGWU* v. *N.L.R.B.*, 374 F. 2d 295, 298 (C.A.D.C.), cert. denied, 387 U.S. 942. Cf. *N.L.R.B.* v. *Johnson*, 368 F. 2d 549, 551, n. 2 (C.A. 9).

II. Substantial Evidence on the Record Considered as a Whole Supports the Board's Findings That the Company Violated Section 8(a)(1) of the Act by Coercively Interrogating Employees Concerning Their Union Membership

As the facts set out above disclose, immediately after receipt of the Union's first letter demanding recognition, the Company through the Danells interrogated the Hanford drivers about their union membership. The Company did not inform its employees of the purpose of the polling, or assure them that they need not answer or that their answers would not result in reprisals. In fact, shortly after the questioning, as discussed *supra*, pp. 11-16, the Company

discharged the employees and closed the Hanford operation because the employees' responses verified the Union's majority claim. Thus, that interrogation violated the Act.

This Court's opinion in *N.L.R.B.* v. *Fullerton Pub. Co.*, 283 F. 2d 545, 551 (C.A. 9) supports the Board's decision here. There the Court agreed that "the conduct of questioning employees concerning their union affiliation in association with the firing of other employees because of their union membership has been held to be coercive and an unfair labor practice to the questioned employees." 283 F. 2d at 551. But it refused to affirm the Board's finding that the questioning was coercive because the subsequently discharged employee was a supervisor; and the firing was thus not an unfair labor practice. *Ibid.* Here, however, the Company discharged employees. Hence, *Fullerton* inferentially supports the Board's conclusion. Accord, *N.L.R.B.* v. *Chautauqua Hardware Corp.*, 192 F. 2d 492, 494 (C.A. 2); *Stokely Foods, Inc.* v. *N.L.R.B.*, 193 F. 2d 736, 739 (C.A. 5); *N.L.R.B.* v. *Elias Brothers Big Boy, Inc.*, 325 F. 2d 360, 364 (C.A. 6). And the logic of the situation here warrants application of the *Fullerton* rationale. If these employees are reinstated and the Company again questions them about union activities, that questioning will have a coercive effect because of the prior discharges. Hence, this Court should affirm the Board's finding and enforce its order.

CONCLUSION

For the reasons stated, it is respectfully requested that the Board's order be enforced in full.

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CERTIFICATE

I certify that, in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

MARCEL MALLET-PREVOST
Assistant General Counsel
National Labor Relations Board

APPENDIX A

Pursuant to Rule 18(a)(f) of the Rules of this Court: Exhibits in the instant case.

(Page references are to the transcript of testimony):

General Counsel's Exhibits

No.	Identified	Received in Evid.
1(a) through 1(j)	6	6
2	23	23
3	26	26
4	81	81
5	109	109
6	326	326
7	327	327

Respondent's Exhibits

No.	Identified	Received in Evid.
1, 2 and 3	28	28
4	57	142
5	203	205
7	244	244
8(a) through 8(s)	277	277
9	300	301
10	320	320
11	350	350

Respondent's Rejected Exhibits

No.	Identified	Rejected
6	216	216
8(t) through 8(x)	277	277

APPENDIX B

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C., Secs. 151 *et seq.*) are as follows:

Rights of Employees

Sec. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8 (a) (3).

Unfair Labor Practices

Sec. 8(a) It shall be an unfair labor practice for an employer—

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7;

* * * *

(3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization: *Provided*, That nothing in this Act, or in any other statute of the United States, shall preclude an employer from making an agreement with a labor organization (not established, maintained, or assisted by any action defined in section 8 (a) of this

Act as an unfair labor practice) to require as a condition of employment membership therein on or after the thirtieth day following the beginning of such employment or the effective date of such agreement, whichever is the later, (i) if such labor organization is the representative of the employees as provided in section 9 (a), in the appropriate collective-bargaining unit covered by such agreement when made, and (ii) unless following an election held as provided in section 9 (e) within one year preceding the effective date of such agreement, the Board shall have certified that at least a majority of the employees eligible to vote in such election have voted to rescind the authority of such labor organization to make such an agreement: *Provided further*, That no employer shall justify any discrimination against an employee for nonmembership in a labor organization (A) if he has reasonable grounds for believing that such membership was not available to the employee on the same terms and conditions generally applicable to other members, or (B) if he has reasonable grounds for believing that membership was denied or terminated for reasons other than the failure of the employee to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership;

* * * *

Sec. 10(a) The Board is empowered, as hereinafter provided, to prevent any person from engaging in any unfair labor practice (listed in section 8) affecting commerce. This power shall not be affected by any other means of adjustment or prevention that

has been or may be established by agreement, law, or otherwise: * * *

(b) Whenever it is charged that any person has engaged in or is engaging in any such unfair labor practice, the Board, or any agent or agency designated by the Board for such purposes, shall have power to issue and cause to be served upon such person a complaint stating the charges in that respect, and containing a notice of hearing before the Board or a member thereof, or before a designated agent or agency, at a place therein fixed, not less than five days after the serving of said complaint: *Provided*, That no complaint shall issue based upon any unfair labor practice occurring more than six months prior to the filing of the charge with the Board and the service of a copy thereof upon the person against whom such charge is made, unless the person aggrieved thereby was prevented from filing such charge by reason of service in the armed forces, in which event the six-month period shall be computed from the day of his discharge. Any such complaint may be amended by the member, agent, or agency conducting the hearing or the Board in its discretion at any time prior to the issuance of an order based thereon.

(c) * * * If upon the preponderance of the testimony taken the Board shall be of the opinion that any person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice and to take such affirmative action including reinstatement of employees with or without back pay, as will effectuate the policies of this Act: * * *

(e) The Board shall have power to petition any court of appeals of the United States, . . . within any circuit . . . wherein the unfair labor practice in question occurred or wherein such person resides or transacts business, for the enforcement of such order and for appropriate temporary relief or restraining order, and shall file in the court the record in the proceedings, as provided in section 2112 of title 28, United States Code. Upon the filing of such petition, the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction of the proceeding and of the question determined therein, and shall have power to grant such temporary relief or restraining order as it deems just and proper, and to make and enter a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board. No objection that has not been urged before the Board, its member, agent, or agency, shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances. The findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive. If either party shall apply to the court for leave to adduce additional evidence and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for the failure to adduce such evidence in the hearing before the Board, its member, agent, or agency, the court may order such additional evidence to be taken before the Board, its member, agent, or agency, and to be made a part of the record . . . . Upon the filing of the record with it, the jurisdiction of the court shall be exclusive and its judgment and

decree shall be final, except that the same shall be subject to review by the . . . Supreme Court of the United States upon writ of certiorari or certification as provided in section 1254 of title 28.

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IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

No. 21906

TED DAVID HOWZE,
Appellant,

vs.

UNITED STATES OF AMERICA,
Appellee.

APPELLANT'S OPENING BRIEF

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IN THE

United States Court of Appeals

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Appellee.

APPELLANT'S OPENING BRIEF

JURISDICTION

This is an appeal from a judgment rendered by the United States District Court for the Eastern District of California.

The appellant was sentenced to the custody of the Attorney General for a period of three years after a one count conviction for violation of Title 50, United States Code App., Section 462 (knowingly fail and refuse to be inducted into the Armed Forces of the United States), Universal Military Training and Service Act [TR 27].[1]

1. TR refers to the Transcript of Record.

Title 18, United States Code, Section 3231, conferred jurisdiction in the District Court over the prosecution of this case. The United States Court of Appeals for the Ninth Circuit has jurisdiction of this appeal under Rule 37 (A) (1) and (2) of the Federal Rules of Criminal Procedure. Notice of Appeal was filed in the time and manner required by law [TR 26].

STATEMENT OF THE CASE

The indictment charged appellant with a violation of the Universal Military Training and Service Act for refusing to submit to induction [TR 1].

Appellant pleaded "not guilty" and was tried by the Honorable M. D. Crocker, District Judge, sitting alone without a jury. Appellant was found guilty and sentenced to imprisonment for a period of three years [TR 27].

A trial brief on behalf of defendant was filed during the trial [TR 13].

The appellant was found guilty [CT 27].[2]

FACTS

Appellant presented two sets of facts that require our consideration:

A.

Appellant declared, at the earliest opportunity, to his conscientious objection to war. This was on his Classification Questionnaire, page 7.[3]

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2. CT refers to the Clerk's Transcript.
3. Government's Exhibit One.

The local board then sent him SSS Form No. 150, Special Form for Conscientious Objector. He filled it out, and returned it [Ex. p. 12].[3] He made out a prima facie case, by the following answers:

1. He believed in a Supreme Being.
2. He stated this belief was superior to any earthly duty.
3. He "received my religious training from an infant from my mother and father—they taught me at home through home bible study and took me to public bible studies."
4. He relied "mostly to my mother for help in understanding the bible. She lives at Parker, Arizona, Rt. 1, Box 35-A."
5. He said "I believe in force, only in the event my life has been attempted, and then I would try to only injure and not kill."
6. He believes "the action which most describe the extent of my belief is the time I have spent in telling others of my feelings concerning the bible and the power of the creator almighty God."
7. He says "I have repeatedly told many many people of my belief, through public address and oral expression."

He signed at the end, although he neglected to sign on the first page. This was on October 27, 1963 [Ex. 15].

The local board classified him in Class III-A because he had a wife and child, on November 7, 1963 [Ex. 11].

Although the file has evidence that he had expressed a willingness to do the civilian work required of a con-

scientious objector, classified in Class I-O, the local board reclassified him into Class I-A when he informed them that he and his wife had separated. This was on March 5, 1965 [Ex. 11, 16].

B.

He then presented evidence of the dependency of his father and mother [Ex. 29]. He was sent a Dependency Questionnaire, SSS Form No. 118 and he executed it [Ex. 38], giving more detailed evidence. The local board's reply was a form letter, rejecting his claim [Ex. 43] and immediately thereafter he was sent an Order to Report for Induction, SSS Form No. 252 [Ex. 44].

No opportunity was given him, by the board's *summary method* of handling his new evidence, to secure either an Appearance Before Local Board nor an administrative appellate determination. The rejection procedure used by his local board does not permit a request for an Appearance or an appeal [Ex. 11].

QUESTIONS PRESENTED AND HOW RAISED

I.

Was the appellant denied due process of law by the local board's refusal to reopen his classification upon his presentation to the board of new evidence affecting his classification? This was raised by the defendant during trial and argument.

II.

Was the denial of administrative appellate opportunity arbitrary, unjust and prejudicial to the appellant? This was raised as above.

III.

Was there a basis in fact for rejecting the classification claims of the appellant? This question was raised by the defendant during trial and argument.

SPECIFICATION OF ERRORS

I.

The district court erred in convicting the defendant and entering a judgment of guilty against him.

SUMMARY OF ARGUMENT

1. Appellant presented a prima facie case in two instances and the local board should have reopened.

By not reopening, and giving him no hearing whatever he was treated unfairly and contrary to the letter and spirit of the regulations:

Dickinson v. *United States,* 74 S. Ct. 152 (1953); *Brown* v. *United States,* 9 Cir., 1954, 216 F.2d 258.

2. An incorrect legal basis was used for decision. *Franks* v. *United States,* 9 Cir., 1954, 216 F.2d 266.

ARGUMENT

I

There Was No Basis-in-Fact for Denying the Registrant a Deferred Classification.

Appellant made two claims that were ignored: one for a conscientious objector classification and one for a hardship classification. Why they were ignored will be discussed below, in "B", "A" being devoted to the prima facie quality of these two claims.

A. His prima facie claims.

1. In our FACTS, above, we recited the details of appellant's showing concerning his conscientious objections. These, indubitably, made out a prima facie case.

2. In our FACTS, above, we referred to the details he gave in his Dependency Questionnaire. Here, too, he made out a prima facie deferred classification showing.

It would appear, therefore, that he was entitled either to one of such classifications or to have his claims and evidence handled by the local board according to another of the regulations, that is, the one that (1) gives the local board the right to form an initial, adverse judgment but that (2) preserves the right of the registrant to his subsequent administrative remedies, 32 C.F.R. § 1625.2.

Section 6 (j) of Title 1 of the Universal Military Training and Service Act, as amended (50 U.S.C. App. 456 (j)), provides:

"Nothing contained in this title . . . shall be construed to require that any person be subject to combatant training and service in the armed forces of the United States who, by reason of religious training and belief, is conscientiously opposed to participation in war in any form. . . ."

Section 1622.14 (A) of the Selective Service Regulations [32 C.F.R. 1622.14 (A)] provides:

"1622.14 Class I-O: Conscientious Objector Available for Civilian Work, Contributing to the Maintenance of the National Health, Safety or Interest.—(A) In Class I-O shall be placed every registrant who

would have been classified in Class I-A but for the fact that he has been found, by reason of religious training and belief, to be conscientiously opposed to participation in war in any form and to be conscientiously opposed to participation in both combatant and noncombatant training and service in the armed forces."

The local board's duties and the courts' scope of review in draft cases were spelled out by the United States Supreme Court in *Dickinson* v. *United States*, 74 S. Ct. 152, 157, 158, 346 U.S. 389 (1953):

"The task of the courts in cases such as this is to search the record for some affirmative evidence to support the local board's overt or implicit finding that a registrant has not painted a complete or accurate picture of his activities. . . . If the facts are disputed the board bears the ultimate responsibility for resolving the conflict—the courts will not interfere. Nor will the courts apply the test of 'substantial evidence'. However, the courts may properly insist that there be some proof that is incompatible with the registrant's proof of exemption."

". . . when the uncontroverted evidence supporting the registrant's claim places him prima facie within the statutory exemption, dismissal of the claim solely on the basis of suspicion and speculation is both contrary to the spirit of the Act and foreign to our concepts of justice."

The dissenting opinion of Mr. Justice Jackson puts the proposition more bluntly (74 S. Ct. 152, 159):

". . . Under today's decision, it is not sufficient that the board disbelieve the registrant. The board must find and record affirmative evidence that he has misrepresented his case. . . ."

In the present case, appellant made out a prima facie case for a I-O classification when he filed with the local board his Form 150 in which he claimed conscientious objection to war in any form based upon religious training and belief.

The government's case (the appellant's Selective Service file placed in evidence as the government's exhibit) is totally barren of any evidence whatsoever tending to cast the slightest doubt on appellant's sincerity.

Appellant claimed membership in the Jehovah's Witnesses.

The Court may take judicial notice of the fact that although Jehovah's Witnesses usually have trouble later in the administrative procedure, because of their claim to be ministers, they almost never have trouble getting a I-O classification. There is not a single shred of evidence in the record to cast doubt on appellant's bona fide membership in Jehovah's Witnesses and belief in their creed.

Thus the local board's denial of I-O classification to appellant was without basis in fact and upholding that arbitrary classification would be contrary to the rule of law as set forth in Dickinson.

The above argument's thrust also applies to his dependency claim, that is, that he met the requirements of the applicable regulations either for a deferred classification or should have been accorded the opportunity to ask for administrative relief. *Miller* v. *United States,* 9 Cir., Dec. 29, 1967, ... F.2d .....

B. Why they were ignored.

Ordinarily, one of Jehovah's Witnesses has had no difficulty in being classified in Class I-O, since 1955. It is almost universally judicially recognized that they have all the qualifications for this classification and that the boards know this. The many reported cases, and a great many of the files of this Court show that Jehovah's Witnesses enter the district court with a I-O classification and opposing an order to report for induction into *civilian work*.

Infrequently, does one of Jehovah's Witnesses have a posture like this appellant. We will discuss these facts in four stages.

(1) Initially, the appellant had a valid claim for a III-A fatherhood, classification and (2) therefore had his conscientious objection claim *correctly* by-passed. This had to be because the law governing this agency provides that a "higher" classification is to be by-passed when the file presents evidence for a "lower" classification, in this instance, III-A. § 1623.2. (3) Then, when the next change of status occurred (the appellant and his wife separated) he was properly deprived of his III-A classification, but the I-O (conscientious objector) claim and evidence in his file should have been considered and was not; (4) when he presented new evidence showing the III-A (hardship to his parents) claim it also should have been considered. By "considered" we mean handled in such a manner that if

the judgment of the local board was against his claims the appellant would still have his administrative opportunities. This, we argue, was a denial of due process.

Miller v. *United States, supra.*

II

The Court Erred in Its Decision of Guilty

The reporter's transcript reveals the legal basis, the standard, used by the trial court, in arriving at its decision:

> "Of course, I think our real problem is that regardless of what was done or what is to be done, the defendant, because of his religious beliefs, can't do anything, he can't accept work in lieu of induction or service in the Armed Forces either one, so any way you go you are going to be in violation of the Selective Service laws." [Rep. Tr. 33]

This standard has already been condemned by this Court in *Franks* v. *United States,* 9 Cir., 1954, 216 F.2d 266:

> . . . "Now, in relation to the I-A-O classification, it must be remembered that the registrant told the local board that he didn't want it anyway, he wouldn't accept it. The local board had before it, 'shall we give him the IV-E now, the I-O, or shall we place him in I-A?'
>
> "The fact that the chairman of the board broached such a classification in questioning Franks, and the fact that Franks made a strong and substantial showing of conscientious objection at least so far as combatant service is concerned, leaves the record open to the interpretation that the board did not consider giving him a I-A-O classification for the reason that he waived and refused it." [269]

CONCLUSION

For the reasons above stated, the judgment of the district court should be reversed and an order entered directing the district court to render and enter a judgment of acquittal.

Respectfully submitted,

J. B. TIETZ
Attorney for Appellant

January 17, 1968.

I certify that, in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

J. B. TIETZ
Attorney for Appellant

NO. 21906

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

TED DAVID HOWZE,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLEE'S BRIEF

APPEAL FROM
THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF CALIFORNIA

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NO. 21906

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IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

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APPELLEE'S BRIEF

I

STATEMENT OF PLEADINGS AND JURISDICTIONAL FACTS

On November 10, 1966, the Federal Grand Jury for the Southern District of California returned an indictment against the appellant charging him with refusal to be inducted into the Armed Forces of the United States in violation of Title 50, U.S.C., App., Section 462 [C.T. 1]. 1/

Pursuant to a plea of not guilty, trial by court commenced on April 11, 1967, before the Honorable MYRON D. CROCKER,

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1/ "C.T." refers to Clerk's Transcript.

United States District Judge, and on the same date appellant was adjudged guilty [C. T. 21].

The indictment charged:

Defendant TED DAVID HOWZE, a male person within the class made subject to selective service under the Universal Military Training and Service Act, registered as required by said Act and the regulations promulgated thereunder and thereafter became a registrant of Local Board No. 77, said Board being then and there duly created and acting, under the Selective Service System established by said Act, in Kern County, California, in the Northern Division of the Southern District of California; pursuant to said Act and the regulations promulgated thereunder, the defendant was classified in Class 1-A and was notified of said classification and a notice and order by said Board was duly given to him to report for induction into the armed forces of the United States of America on March 24, 1966, in Kern County, California, in the division and district aforesaid; and at said time and place the defendant knowingly failed and neglected to perform a duty required of him under said Act and the regulations promulgated thereunder in that he then and there knowingly failed and refused to be inducted into the armed forces of the United States as so notified and ordered to do.

On May 1, 1967, United States District Judge Myron D. Crocker committed appellant to the custody of the Attorney General for a term of three years [C. T. 27].

Notice of Appeal was filed on May 1, 1967 [C. T. 26].

Jurisdiction of the District Court was based upon Title 28, United States Code, Section 3231. Jurisdiction of this Court is based upon Title 28, United States Code, Sections 1291 and 1294.

II

STATUTES INVOLVED

Title 50 App., Section 462, United States Code, provides in part:

> "Any member of the Selective Service System or any other person charged as herein provided with the duty of carrying out any of the provisions of this title . . . or the rules or regulations made or directions given thereunder, who shall knowingly fail or neglect to perform such duty . . . or who otherwise evades or refuses . . . service in the Armed Forces or any of the requirements of this title . . . or who in any manner shall knowingly fail or neglect or refuse to perform any duty required of him under or in the execution of this title . . . or rules, regulations or directions made pursuant to this title . . . shall, upon conviction in any District Court of the United States of competent jurisdiction, be punished by imprisonment for not more than five years or a fine of not more than $10,000, or by both. . . ."

Title 32, Code of Federal Regulations, Section 1622.30, provides in part:

"1622.30 Class III-A: Registrant with a child or children; and registrant deferred by reason of extreme hardship to dependents.

* * * * *

"(b) In Class III-A shall be placed any registrant whose induction into the armed forces would result in extreme hardship (1) to his wife, divorced wife, child, parent, grandparent, brother, or sister who is dependent upon him for support, ..."

* * * * *

"(d) In the consideration of a dependency claim, any payments of allowances which are payable by the United States to the dependents of persons serving in the Armed Forces of the United States shall be taken into consideration, but the fact that such payments of allowances are payable shall not be deemed conclusively to remove the grounds for deferment when the dependency is based upon financial considerations and shall not be deemed to remove the grounds for deferment when the dependency is based upon other than financial considerations and cannot be eliminated by financial assistance to the dependents."

Title 32 C. F. R. 1625 3, provides in part:

"1625. 3 When registrant's classification shall be reopened and considered anew.

"(a) The local board shall reopen and consider anew the classification of a registrant upon the written request of the State Director of Selective Service or the Director of Selective Service and upon receipt of such request shall immediately cancel any Order to Report for Induction (SSS Form No. 252) or Order to Report for Civilian Work and Statement of Employer (SSS Form No. 153) which may have been issued to the registrant."

* * * * *

Title 32 C. F. R. 1625. 4, provides in part:

"1625. 4 Refusal to reopen and consider anew registrant's classification.

"When a registrant, any person who claims to be a dependent of a registrant, any person who has on file a written request for the current deferment of the registrant in a case involving occupational deferment, or the government appeal agent files with the local board a written request to reopen and consider anew the registrant's classification and the local board is of the opinion that the information accompanying such request fails to present any facts in addition to those considered when the

registrant was classified or, even if new facts are presented, the local board is of the opinion that such facts, if true, would not justify a change in such registrant's classification, it shall not reopen the registrant's classification. In such a case, the local board, by letter, shall advise the person filing the request that the information submitted does not warrant the reopening of the registrant's classification and shall place a copy of the letter in the registrant's file. No other record of the receipt of such a request and the action taken thereon is required."

Title 32 C. F. R. 1641. 2(b) provides:

> "If a registrant or any other person concerned fails to claim and exercise any right or privilege within the required time, he shall be deemed to have waived the right or privilege."

III

QUESTIONS PRESENTED

(1) Having failed to exhaust his administrative remedies and to raise the issue in the trial court, is the appellant entitled to litigate his classification for the first time in this Court?

(2) Did the trial court err in failing to find that appellant was denied due process of law by the manner in which the

local board classified him?

(3) Was the decision of trial court based upon an incorrect ground?

IV

STATEMENT OF FACTS

Appellant's selective service file, Government's Exhibit 1, reveals the following facts:

On October 24, 1960, appellant registered at Local Board No. 77, 225 Chester Street, Bakersfield, California [G. E. -1, pp. 1-2]. 2/

On October 1, 1963, the Local Board mailed appellant a Classification Questionnaire which he completed and returned on October 13, 1963. Appellant indicated in this questionnaire that he was then employed as an Haro operator, and that his prior work experience included that of a cowboy, welder, and farm hand. Series VII of the questionnaire was not completed by the appellant, but appellant signed Series VIII, thereby requesting the Local Board to furnish him a form for conscientious objectors [G. E. -1, pp. 4-9].

On October 30, 1963, the Board received from appellant a Selective Service Form No. 150, which had been mailed to him on October 14, 1963 [G. E. -1, pp. 12-13]. Appellant neglected to

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2/ G. E. -1 refers to Government's Exhibit 1, appellant's Selective Service file.

sign the Claim for Exemption, Series I, on page (1) of the form.

On page (1) of this form, appellant stated, "I believe in one supreme God of the universe and because of my belief in him I cannot place any man or group of men above or any duty to them above the almighty God." [G.E.-1, p. 12]. On page (2), appellant stated that he would use force "only in the event my life has been attempted, and then I would try to only injure and not kill." On page (3), appellant stated that "Jehovah's Witness do not believe in participation of arm forces of any country." Appellant did not answer the question "when, where, and how did you become member of said sect or organization?", on page 3 of the form (pp. 12-15).

On November 11, 1963, appellant was classified 3-A by the Local Board and was mailed notice of this classification on November 7, 1963 [G.E.-1, p. 11].

On February 8, 1965, a Current Information Questionnaire, Form No. 127, was mailed to appellant which was completed and returned by appellant on February 19, 1965 [G.E.-1, p. 11].

On March 5, 1965, appellant was re-classified I-A by the Local Board and was mailed notice of this classification [G.E.-1, p. 11].

On February 4, 1966, appellant's Dependency Questionnaire was reviewed, at which time the Local Board determined that appellant's case should not be reopened and that he should not be reclassified. Notice of this determination was mailed to appellant on February 9, 1966 [G.E.-1, pp. 11, 43].

On February 21, 1966, the Local Board ordered appellant to report for induction on March 24, 1966 [G.E.-1, p. 44]. On March 24, 1966, appellant refused to be inducted into the Armed Services [G.E.-1, pp. 45-46], and gave a signed statement of his refusal [G.E.-1, p. 47].

Appellant's conscientious objector's form (SSS 150) was reviewed and considered by the local board prior to classifying appellant [R.T. 13]. 3/

V

ARGUMENT

A. APPELLANT MAY NOT FOR THE FIRST TIME IN THIS COURT RAISE THE ISSUE OF WHETHER THERE IS A BASIS-IN-FACT FOR HIS CLASSIFICATION.

At no stage of the proceedings, from the date of appellant's original classification until the filing of his opening brief in this Court, has appellant alleged that the draft board's classification was without basis-in-fact.

This Court will not consider an issue on appeal which was never raised at the trial below.

Morales v. United States, 373 F.2d 527 (9th Cir. 1967);

3/ "R.T." refers to Reporter's Transcript.

Grant v. United States, 291 F. 2d 746
(9th Cir. 1961), cert. denied
368 U.S. 399 (1961).

Appellant is not entitled to judicial review by a trial court, much less this Court, of his classification, since he neither requested a personal appearance before the board, nor appealed his classification [R. T. 17-18].

Woo v. United States, 350 F. 2d 994
(9th Cir. 1965);

Grief v. United States, 348 F. 2d 914
(9th Cir. 1965);

Williams v. United States, 203 F. 2d 85
(9th Cir. 1953), cert. denied
345 U.S. 1003 (1953);

Defendant is deemed to have waived his rights and privileges when he has failed to exhaust his administrative remedies by a timely appeal from the Board's classification.

32 C.F.R. 1641.2(b).

A registrant who believes he has been erroneously classified must exhaust all administrative remedies before his claim may be heard in the courts.

Woo v. United States, supra;

Williams v. United States, supra.

Dickinson [4] and Franks [5] cited by appellant [AB 5] [6] are inapposite since appellants there exhausted their administrative remedies and raised the issue at trial.

B. NO DUE PROCESS RIGHTS OF APPELLANT WERE VIOLATED BY THE LOCAL BOARD'S REFUSAL TO REOPEN APPELLANT'S FILE AFTER REVIEWING HIS DEPENDENCY CLAIM.

Again, appellant submits an issue for review by this Court which was not broached at trial. As pointed out earlier, this Court will not consider the issue under these circumstances.

Morales v. United States, supra;

Grant v. United States, supra.

The local board reviewed appellant's request and denied his motion to reopen his classification [G.E.-1, p. 11; R.T. 9]. The Board need not reopen a registrant's file each time such a communication is received, thereby affording him another opportunity to appeal.

Woo v. United States, supra.

Miller v. United States, [7] relied upon by appellant, does

4/ Dickinson v. United States, 346 U.S. 389 (1953).

5/ Franks v. United States, 216 F.2d 266 (9th Cir. 1954).

6/ "AB" refers to Appellant's Brief.

7/ No. 21,417, United States Court of Appeals for the Ninth Circuit, Dec. 29, 1967.

not require reopening each time a registrant submits a new claim for a deferment.

As distinguished from Miller, the record before this Court discloses no basis upon which to conclude that the Local Board "shortcut the situation by directly proceeding . . . to a consideration of whether appellant was entitled to a . . . classification on the merits of the probative elements of its file." Miller v. United States, supra, p. 5.

Further, no evidence was submitted below and none is revealed by the record which would enable this Court to conclude that the Local Board did not "deal with the alleged facts or evidence of appellant's [dependency] form as a question of whether this legally could provide a basis for a reopening to be made. . . ." Miller v. United States, supra, p. 5.

On the contrary, the record indicates that the Board treated appellant's claim as a motion to reopen which was properly denied; that is to say, the Local Board here did not engage in a general consideration and evaluation of the facts in appellant's entire file, as was the case in Miller.

However, had the issue been raised at trial, the trial court could have found that the Local Board based its refusal to reopen and reclassify the appellant solely on the facts revealed in the dependency claim itself, in that appellant's claim merely asserts a possible financial hardship to his parents which would be relieved by military payments and allowances and by contributions from the registrant's brothers and sisters [G. E. -1, pp. 38-40]. See

32 C.F.R. 1622.30(d), 1625.4.

In this connection, it is submitted that the requirements enunciated in Miller have no application to claims for exemption or deferment other than conscientious objector's claims because of the nature of the claim for a conscientious objection and the manner of establishing it. A prima facie showing of a conscientious objection is made by merely asserting one's commitment to certain principles. The registrant's sincerity is the paramount concern of the Board. The extreme financial hardship exemption, however, requires that objective facts be set forth to establish a prima facie case and the registrant's sincerity is not the determining factor. In the latter case, the local board can evaluate the merits of a registrant's request without going beyond the facts submitted in the claim itself; whereas, when a conscientious objector exemption is sought, the prima facie showing required is such that the board frequently must resort to a review of the entire file in order to evaluate the sincerity of the registrant. For this reason, Miller should not be extended to require reopening where the Local Board, as here, considers a claim for exemption or deferment other than a conscientious objection and refuses to reopen or reclassify the registrant.

Another reason requires that Miller be strictly limited to its facts. If reopening is required irrespective of the manner in which the Board considers and rejects the registrant's claim, the type of exemption or deferment claimed, and the factual showing made by the registrant, the selective service system would be

rendered ineffectual. A registrant simply by repeatedly submitting claims for deferment or exemption, followed by the taking of administrative appeals from denials of those claims, could delay induction indefinitely. In short, conscription could be avoided by anyone who chooses to do so.

C. THE COURT'S DECISION WAS NOT ERRONEOUS.

In rendering its decision the court said:

> "I think the Board did consider your conscientious objection and denied it and then you should have appealed from it to call that to their attention to regain consideration, although I don't think it would have done any good. So, I will find you guilty of the offense as charged." [R. T. 33].

The court rejected appellant's contention that the board failed to consider his conscientious objector claim before classifying him 1-A, and there was substantial evidence to support the finding [R. T. 9-10 and 32].

The issue in Franks v. United States, supra, adverted to by appellant [AB 10], was never raised in the court below. Nothing at trial or in appellant's selective service file indicates that the board classified defendant 1-A because they knew he would not accept a 1-A-O or any other classification. Neither does a reading

of the trial court's entire comments indicate that the court decided the case on a ground not before it.

VI

CONCLUSION

For the foregoing reasons, the judgment should be affirmed.

Respectfully submitted,

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CERTIFICATE

I certify that, in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

/s/ Craig B. Jorgensen
CRAIG B. JORGENSEN

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

No. 21906

TED DAVID HOWZE,
Appellant,

vs.

UNITED STATES OF AMERICA,
Appellee.

APPELLANT'S CLOSING BRIEF

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IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

No. 21906

TED DAVID HOWZE,
Appellant,

vs.

UNITED STATES OF AMERICA,
Appellee.

APPELLANT'S CLOSING BRIEF

Point I.

In our Opening Brief (p. 4) we showed that appellant made a claim for a dependency classification [Ex. 29], that he thereafter gave detailed evidence of this [Ex. 38], that the local board's reply was a form letter, rejecting his claim [Ex. 43], and that immediately thereafter he was sent an Order to Report for Induction SSS Form No. 252 [Ex. 44].

We pointed out, argumentatively, that no opportunity was given him, by the board's summary method of handling his new evidence, to secure either an Appearance Before Local Board or an administrative appellate determina-

tion. The rejection procedure used by his local board does not permit a request for an Appearance or an appeal [Ex. 11].

Appellee's Brief argues:

1. This issue was not raised until the appeal.

We answer: Rule 52(b) [F.R.Cr.P.] permits this Court to recognize plain error. Also, see *Chernekoff* v. *United States,* 9 Cir., 1955, 219 F. 2d 721.

Further, compare the reasoning in *People* v. *Wellborn,* 65 Cal. Rptr. 8 (Advance Sheets of February 5th), where an attorney's failure to present available defense was deemed a denial of due process.

2. "A registrant who believes he has been erroneously classified must exhaust all administrative remedies before his claim may be heard in the courts." (p. 10 of Appellee's Brief).

We answer: he had no administrative remedies to exhaust. A registrant cannot appeal from a refusal to reopen. See *Miller* v. *United States,* 9 Cir., 1967, No. 21417, decided December 29, 1967.

3. "No Due Process Rights of Appellant Were Violated by the Local Board's Refusal to Reopen Appellant's File After Reviewing His Dependency Claim," again arguing that since this wasn't raised at the trial it may not be considered by the Court.

On this point, however, appellee adds an argument not dealt with by us above: that *Miller* is distinguishable.

It is said on page 12, "the record indicated that the Board treated appellant's claim as a motion to reopen which was properly denied."

This is the very issue before the Court, namely, may new evidence be ignored?

Appellee goes on to argue the point by asserting that there was a basis in fact for deciding that the new claim lacked merit. The fallacy of applying this standard is pointed out by *Miller*: the local board could reject his claim but it may not deprive the registrant of an administrative appellate opportunity.

The argument of appellant, on this subject, concludes with the old bugaboos: "A registrant . . . could delay induction indefinitely" and "In short, conscription could be avoided by anyone who chooses to do so." If this were so the lawyers in this work would have learned it by this time and few, if any, would leave their offices for the time-consuming and less-lucrative court work.

Point II

In our Opening Brief (p. 10) we next argued that the trial court used an imported, already condemned standard for finding this appellant guilty.

We quoted a paragraph of the trial court's final comment and appellee quotes another, each to support our position.

What appellee quotes may absolve the court from error with respect to the conscientious objector claim of appel-

lant, but it doesn't touch the other, the new, dependency claim.

We submit that—

1. The new dependency claim should have been handled as this Court set forth in *Miller,* and

2. The paragraph we quoted from *Franks* v. *United States,* 9 Cir., 1954, 216 F. 2d 266 applies on our *final* point, the dependency point.

Respectfully,

J. B. TIETZ
Attorney for Appellant

March 7, 1968.

I certify that, in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

J. B. TIETZ
Attorney for Appellant

No. 21,909

In the United States Court of Appeals for the Ninth Circuit

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

SONORA SUNDRY SALES, INC., d/b/a VALUE GIANT, RESPONDENT

On Petition for Enforcement of an Order of the National Labor Relations Board

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

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In the United States Court of Appeals for the Ninth Circuit

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On Petition for Enforcement of an Order of the National Labor Relations Board

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BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

JURISDICTION

This case is before the Court upon petition of the National Labor Relations Board to enforce its order issued against Sonora Sundry Sales, Inc., d/b/a Value Giant on November 1, 1966. The Board's decision and order (R. 38)[1] are reported at 161 NLRB No.

[1] References to the pleadings, decision and order of the Board, the Trial Examiner's recommended decision and order and other papers reproduced as Volume I, Pleadings, are designated "R." References to portions of the stenographic

53. This Court has jurisdiction under Section 10(e) of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C., Sec. 151, *et seq.*), the unfair labor practices having occurred in Sonora, California, within this judicial circuit.

STATEMENT OF THE CASE

I. The Board's Findings of Fact

Briefly, the Board found that respondent violated Section 8(a)(1) of the Act by threatening its employees that execution of a union contract would result in decreased wage rates. The Board also found that respondent refused to recognize and bargain with the Union [2] which represented a majority of the employees in an appropriate unit, in violation of Section 8(a)(5) and (1) of the Act. The facts are as follows:

On May 27, 1965, the Company opened a retail store in Sonora, California (R. 14; Tr. 179). Between June 3 and June 8, the Union solicited and obtained membership applications from 8 of the 12 store employees (R. 14; Tr. 9-10, 15-17)[3] and, on June 9, re-

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transcript reproduced pursuant to the Rules of This Court are designated "Tr." "G.C. Exh." refers to the General Counsel's exhibits. "R. Exh." refers to respondent's exhibits. References preceding a semicolon are to the Board's findings; those following are to the supporting evidence.

[2] Retail Clerks Union Local No. 588, Retail Clerks International Association, AFL-CIO.

[3] The Union obtained 11 authorization cards, of which 3 (G.C. Exhs. 9, 12 and 16) were signed by employees who were no longer in the unit on June 9, the critical date.

quested recognition as bargaining representative in an appropriate unit (R. 14; Tr. 19, 193-194).

The Company first learned of the Union campaign on June 5, when an employee informed Store Manager W. H. Finch that he had signed a membership application (R. 14; Tr. 214). Finch then telephoned Company President Paul Kase and passed on the information. Kase told Finch that he would send him copies of a memorandum and ballots for distribution to the employees (R. 14; Tr. 215).

On June 7, Finch called the employees of the store together for an orientation meeting at which he reviewed matters such as customer relations and employee benefits (R. 14; Tr. 86, 212-213). During the meeting, an employee inquired about the drug industry contract that a Union representative was showing employees. Finch said that this agreement did not apply to the Sonora store as the store did not have a prescription pharmacy. He told the employees that the only contract relevant to this store was a variety store contract and that the starting wage in the variety store contract was less than the employees were currently receiving (R. 14; Tr. 86-88, 90-91).

On June 9, Finch received the memoranda and ballots from Kase and distributed a copy of each to employees working that day, telling them that the Company would like them to mark the ballots and place them on Finch's desk, but that it was not mandatory. Other employees received the same ballots and information the next day, June 10. (R. 14, 4; Tr. 178-181). The memorandum to employees was from Com-

pany President Kase and asked the employees to indicate their "opinion concerning this matter" on the ballot. It explained that the store would not fall under the "Drug Industry" contract, which Union representatives have been circulating, because the store did not have a prescription pharmacy (R. 15; R. Exh. 6). The ballot stated that the Company doubted that employees "would want us to recognize the union unless you voted for the Union in a secret ballot election," and asked the employees not to choose whether or not they wanted a union, but whether they wanted a secret ballot election or recognition on the basis of a card check (R. 15-16; R. Exh. 5). Twelve ballots were returned to Finch's desk on June 9 and 10, eleven having been marked for a "secret ballot election" and the twelfth being unmarked (R. 16; Tr. 181-183). Finch kept the ballots until Saturday, June 12, when he turned them over to Retail Supervisor Russell Robinson (R. 16; Tr. 183).

Meanwhile, on the afternoon of June 9, Union representatives Jerry Turner and Ray Mierly visited Finch (R. 16, Tr. 17). Turner told Finch that the Union had organized the store's employees and was now demanding recognition as bargaining agent (R. 16; Tr. 19). He handed Finch a demand letter (G.C. Exh. 2) and a "Recognition Agreement" (G.C. Exh. 3) by which the Company, having examined the cards, might recognize the Union and agree to bargain collectively (R. 16-17; Tr. 18-19). Finch asked for proof of Turner's claim to represent the employees and Turner handed him eleven signed authoriza-

tion cards (G.C. Exh. 8-18),[4] to which Finch replied that it appeared the Union had the employees signed up (R. 17; Tr. 19). Finch, however, questioned his own authority to sign the documents and decided to call the Company's main office in San Francisco (R. 17; Tr. 195-196). He was unable to contact anyone in authority, but asked Paul Kase's secretary to contact an attorney (R. 17; 197-200). Finch then re-read the documents and, after acknowledging that the Union had a majority, he and Turner signed the "Recognition Agreement" (R. 17; Tr. 20-21). Turner handed the agreement to Mierly, who left (R. 17; Tr. 21, 371).

A short time later Finch received a telephone call from Company attorney Albert Kesseler. After Finch had told Kesseler about the visit and read the documents over the phone, Kesseler told Finch not to sign any documents (R. 17; Tr. 115-116). Kesseler then spoke to Turner and told him that Finch was not to sign anything (R. 17; Tr. 117). Kesseler, however, never questioned the Union's majority status. When Turner hung up, he asked Finch to sign another document (G.C. Exh. 4) acknowledging that Finch had examined authorization cards signed by a majority of the employees. Finch signed as requested (R. 17; Tr. 22).

On June 12, 1965, Russell Robinson, retail supervisor of Ames Mercantile Company, Inc., of which respondent is a subsidiary, came to Sonora to speak to the store employees (R. 17; Tr. 150). Robinson told

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[4] See note 3, *supra*.

the employees again that the Company would not sign a "drug contract," because there was no prescription counter and that the store would most likely be under a "discount" contract (R. 18; Tr. 67, 153-154). He stated that the starting wage under the discount store was $1.35 per hour, lower than the $1.40 per hour wage the employees were currently receiving (R. 18; Tr. 153). An employee inquired about the $1.50 wage rate he had expected to receive when the store opened, but Robinson explained that the $1.50 rate did not go into effect until a later period. He added that if the store was under a union contract, "it would take [the employees] a longer period of time to build up to top pay than it would if [they] weren't union" (R. 18; Tr. 67-69, 76, 142).

On June 14, employees David Tingle and Jayne Casler composed a letter demanding the return of their membership applications and secret ballot procedures. The letter was signed by nine employees, six of who had signed authorization cards, and was sent to the Union, with a copy later sent to the Company (R. 18; Tr. 13-14, 353-355, R. Exh. 1).

On June 15, the Company informed the Union by letter that "the matter of the union situation in our Value Giant Store in Sonora is currently being discussed with our Attorneys. We will contact you later." (R. 18; G.C. Exh. 5). The Union answered on June 21, requesting bargaining sessions on specified dates in the immediate future (R. 18-19; G.C. Exh. 6).

On July 1, the Union filed the refusal to bargain charge in the instant case (R. 19). On July 7, Kase wrote to the Union that the Company had appointed Ray Vetterlein of Labor Relations Associates to represent it in this matter and suggested that the Union contact him (R. 19; G.C. Exh. 7). Five days later, on July 12, Vetterlein, while speaking to Union Secretary Alexander, told him that the "recognition problem" would have to be solved before the Company would bargain with the Union (R. 19; Tr. 323-325).

On July 18, the Company distributed a memorandum with employees' paychecks, notifying them that an across-the-board raise in wage rates had gone into effect July 1, along with an increase in health insurance coverage. The memorandum also thanked employees for their efforts and assured that the Company would continue to provide wage and benefits "equal to or better than the prevailing industry rates" (R. 19; Tr. 208-209; G.C. Exh. 20). A wage raise from $1.40 to $1.45 went into effect at the Sonora store pursuant to the memorandum, but the other raises mentioned in it did not, because of the pendency of the instant case (R. 19; Tr. 209-211).

II. The Board's Conclusions and Order

Upon the foregoing facts the Board found that the Company violated Section 8(a)(1) of the Act by threatening employees that if they joined the Union it would take them longer to build up to top pay than without the union. The Board further found that the Company violated Section 8(a)(5) and (1) by refusing to recognize and bargain with the Union.

The Board ordered the Company to cease and desist from the unfair labor practices found. Affirmatively, the Board's order requires the Company, upon request, to bargain collectively with the Union, and to post the customary notice (R. 38-45).[5]

ARGUMENT

I. The Board Properly Found That the Company Violated Section 8(a)(1) of the Act by Threatening Employees With Lower Wages If They Selected the Union as Their Bargaining Representative

As set forth in the Statement, three days after the Union's presentation of the authorization cards to Store Manager Finch, the Company's retail supervisor, Robinson, told the employees that the Company would not accept a "drug industry" contract, and that, under the contract the Company would accept, it would take the employees longer to build up to top pay than without a union. On these facts the Board found that Robinson threatened economic reprisal and thereby exceeded legitimate persuasive efforts, thus

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[5] The Trial Examiner recommended dismissal of the complaint (R. 22). However, there is no conflict between the Examiner and the Board with respect to "evidence supporting [the Board's] conclusion." *Universal Camera Corp.* v. *N.L.R.B.*, 340 U.S. 474, 496. As the courts have recognized, the Board is the decision making authority empowered to draw inferences and legal conclusions from the underlying facts found by the Examiner, and the Examiner's contrary conclusions are entitled to no special weight. *N.L.R.B.* v. *A.P.W. Products Co.*, 316 F. 2d 899, 903-904 (C.A. 2); *Oil Chemical and Atomic Workers, etc.* v. *N.L.R.B.*, 362 F. 2d 943, 945-946 (C.A.D.C.).

engaging in interference, restraint and coercion as defined by Section 8(a)(1) of the Act.

Robinson's speech was a clear attempt by the Company to dissuade the employees' from their Union allegiance by, in effect, threatening to decrease their wages. He specifically indicated that employees, if they selected the Union to represent them, would not obtain pay raises they would otherwise have received. The Board and the courts have long held that threats that unionization will result in wage reductions or loss of benefits violate the Act. *Surprenant Mfg. Co.* v. *N.L.R.B.*, 341 F. 2d 756 (C.A. 6); *N.L.R.B.* v. *Stanton Enterprises, Inc.*, 351 F. 2d 261, 263-264 (C.A. 4); *N.L.R.B.* v. *Marsh Supermarkets, Inc.*, 327 F. 2d 109, 111 (C.A. 7), cert. denied, 377 U.S. 944; Cf. *N.L.R.B.* v. *Ambrose Distributing Company*, 358 F. 2d 319 (C.A. 9), cert. denied, 385 U.S. 838.

The Company contended before the Board that Robinson's statement constituted permissible argument in support of management's opposition to the advent of a union. However, "[w]hether an employer has employed language which is coercive in its effect is a question essentially for the specialized experience of the N.L.R.B." *Daniel Construction Co.* v. *N.L.R.B.*, 341 F. 2d 805, 810, 811 (C.A. 4), cert. denied, 382 U.S. 831. As the Sixth Circuit has stated:

> [I]f the inference or conclusion found by the Board that the statements constituted a threat is a reasonable one, which it was permissible for the Board to make, its conclusion will not be set aside on review, even though a different infer-

> ence or conclusion may seem more plausible and reasonable to us. *Surprenant Mfg. Co.* v. *N.L.R.B.*, 341 F. 2d 756, 760 (C.A. 6).

In the instant case, Robinson sounded the "discouraging warning" that if the Union were to come in, the employees' wages would be adversely affected and the Board reasonably inferred that the employees would take the statement as a threat of economic reprisal. See *Hendrix Manufacturing Co.* v. *N.L.R.B.*, 321 F. 2d 100, 105 (C.A. 5). The Board's finding in this regard was a permissible one under the circumstances and, accordingly, is entitled to affirmance on review. *Universal Camera Corp.* v. *N.L.R.B.*, 340 U.S. 474, 488.

II. Substantial Evidence on the Record as a Whole Supports the Board's Findings That the Company Violated Section 8(a)(5) of the Act by Refusing to Bargain With the Union

Section 8(a)(5) of the Act requires an employer "to bargain collectively with the representatives of his employees, subject to the provisions of Section 9(a)." That section provides that "Representatives designated or selected for the purpose of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit * * *." Although under Section 9(c)(1) the Board conducts elections to determine representative status, it has long been settled that such status may be shown by other means. See, *United Mine Workers* v. *Arkansas Oak Flooring Co.*, 351 U.S. 62, 71-72. Thus, when a majority of employees in an appropriate unit sign

union authorization cards, an employer violates Section 8(a)(5) if he insists on an election and refuses to recognize and bargain with the union, unless such refusal is motivated by a good faith doubt of the union's majority status. *Retail Clerks Union, Local 1179* v. *N.L.R.B. (John P. Serpa, Inc.)*, 376 F. 2d 186, 190 (C.A. 9); *N.L.R.B.* v. *Security Plating Co.*, 356 F. 2d 725, 726-727 (C.A. 9); *N.L.R.B.* v. *Hyde*, 339 F. 2d 568, 570 (C.A. 9); *Sakrete of Northern California, Inc.* v. *N.L.R.B.*, 332 F. 2d 902, 908-909 (C.A. 9), cert. denied, 379 U.S. 961; *Snow* v. *N.L.R.B.*, 308 F. 2d 687, 691, 694 (C.A. 9); *N.L.R.B.*, v. *Trimfit of California, Inc.*, 211 F. 2d 206, 209-210 (C.A. 9); *Joy Silk Mills* v. *N.L.R.B.*, 185 F. 2d 732, 741 (C.A.D.C.), cert. denied, 341 U.S. 914. We show below that respondent's refusal to bargain was not motivated by a good faith doubt of the Union's majority and was, therefore, unlawful.

Thus, the Union presented eight signed authorization cards [6] to Store Manager Finch on June 9. Finch examined the cards and acknowledged the Union's majority status among the 12 employees of the store. Finch then signed a "Recognition Agreement" recognizing the Union's majority status and agreeing to bargain collectively with the Union (G.C. Exh. 3), as well as a document acknowledging that he had exam-

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[6] Each authorization card recited, *inter alia*, that the signer "hereby authorize[s] RETAIL CLERKS INTERNATIONAL ASSOCIATION to represent me for purposes of collective bargaining and handling of grievances, either directly or through such local union as it may duly designate" (G.C. Exh. 8-18).

ined proof of the Union's majority status (G.C. Exh. 4). Thereafter, respondent refused to bargain with the Union despite the latter's request.

These facts, we submit, establish respondent's violation of its bargaining obligation. *N.L.R.B.* v. *Mutual Industries, Inc.*, —— F. 2d —— (C.A. 9), decided October 6, 1967, 66 LRRM 2359, 2360; *Snow* v. *N.L.R.B.*, *supra; Retail Clerks Union, Local 1179* v. *N.L.R.B. (Serpa)*, *supra.* In *Serpa*, five of the employer's seven employees signed union authorization cards. Union officials then came to the employer's general manager, Peri, placed the authorization cards on his desk, stated that the Union represented a majority of the employees, and requested that Peri sign a "recognition agreement". Peri expressed no doubt as to the validity of the authorization cards but said that he wanted to call his lawyer and that he would contact the union the next day, Saturday. Although he talked to his lawyer on Saturday, Peri did not call the union that day or thereafter. Meanwhile, following the demand for recognition, two of the employees withdrew their bargaining authorizations, without any encouragement from the employer. The Court held that, on these facts, a violation of Section 8(a)(5) had been established. The Court noted that at no time did Peri challenge the authenticity of the cards; to the contrary, he was given an opportunity to check them against his payroll records but declined to do so, apparently because he had no objection to them. Thus, said the Court, "when the employer makes his own examination of the authorization cards and is convinced of their identity and validity, * * * a subse-

quent refusal to recognize the Union is adequate affirmative evidence of a lack of good faith doubt as to majority status" (376 F. 2d at 190). Finally, the Court held that an employer may not delay recognition of a union after it is convinced that the union enjoys majority status among the employees. In *Serpa*, the employer committed no coercive acts in order to destroy the union's majority but merely used "delaying tactics * * * with the hope that the Union 'would just go away' ", conduct "designed to gain time for the employees to reconsider their decision to have the Union as their bargaining representative" (376 F. 2d at 191). And, concluded the Court, "While there was no evidence to indicate active impropriety on the part of [the employer], its undue delay in answering the Union's request for bargaining is inconsistent with the policy and purpose of Section 8(a)(5) of the Act and evidences employer rejection of collective bargaining principles" (*ibid.*).

The case at bar is, we submit, far stronger than *Serpa*. For here, the Company's representative not only was afforded an opportunity to examine the cards but he in fact examined them, acknowledged their validity and the Union's majority status, and signed a recognition agreement. The bargaining obligation matured at that point (*Snow* v. *N.L.R.B.*, *supra*, 308 F. 2d at 694; *N.L.R.B.* v. *Kellogg's Inc.*, 347 F. 2d 219, 220 (C.A. 9)), and may not be avoided by the defenses respondent asserted before the Board and to which we now turn.

First, argues respondent, the authorization cards —which are clear and unequivocal on their face (see

n. 6, *supra*)—are invalid because Union representative Turner told the employees that their cards would not be shown to their employer. Accordingly, says respondent, the Union's showing the cards to Store Manager Finch was contrary to what Turner had told the employees and thus rendered the cards invalid. This argument misconceives the applicable law. The Board and courts have held that valid authorization cards may be invalidated where they are procured by misrepresentations, most frequently the solicitor's assurance that the cards would be used only to support the union's petition for a Board election. Such misrepresentations render authorization cards invalid because it cannot be said that the signers, by executing cards in these circumstances, "clearly manifested an intention to designate the Union as their bargaining representative." *Englewood Lumber Company*, 130 NLRB 394, 395. See also, *N.L.R.B.* v. *Gotham Shoe Mfg. Co.*, 359 F. 2d 684, 686, (C.A. 2); *Matthews & Co.* v. *N.L.R.B.*, 354 F. 2d 432, 436 *et seq.* (C.A. 8), cert. denied, 384 U.S. 1002; *Bauer Welding & Metal Fabricators* v. *N.L.R.B.*, 358 F. 2d 766 (C.A. 8). What Turner told the employees here—that the authorization cards would not be shown to their employer—was not intended to induce the signing of cards by employees who would not otherwise sign a card because they did not want a union to represent them. To the contrary, all Turner's statement could do would be to allay the employees' fears that their employer would learn of their union adherence and take reprisals against them. This bears no relationship whatever to the signer's actual intent—the designation of the Union as his collective

bargaining representative. *Englewood Lumber Company, supra;* cf. *N.L.R.B.* v. *Hyde, supra,* 339 F. 2d at 571. Before the Board, respondent conceded that the cards might properly have been used to support a recognition demand based on a third-party check (cf. *Snow* v. *N.L.R.B.*, 308 F. 2d 687 (C.A. 9)) but not a card check by the employer himself. It is clear, however, that the "difference in the means of checking a union's majority is of no significance; an employer's check certainly is as reliable as that by a third party." *Jem Mfg., Inc.*, 156 NLRB 643, 645, citing *Kellogg Mills*, 147 NLRB 342, enforced, 347 F. 2d 219 (C.A. 9); accord, *Retail Clerks Union, Local 1179* v. *N.L.R.B., supra,* 376 F. 2d at 190 and n. 6.

Next, argues respondent, Finch had no authority to recognize the Union. The record shows, however, that Finch, as manager of the Sonora store, was the Company's highest official there and performed his job with minimal supervision from respondent's home office in San Francisco.[7] He had the authority to buy merchandise and to bind the Company by signing purchase orders (Tr. 239-240). Finch hired at least some of the employees who were working at the store at the time of the demand (Tr. 65, 141), and had the authority to give them raises (Tr. 274-275). In the light of his almost autonomous position in running the Sonora operation, it defies credulity to suggest

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[7] Sonora is some 110 miles from respondent's home office in San Francisco. Finch's immediate superior, Hughes, whose office is in San Francisco, visits the Sonora store only sporadically; as Finch testified, "He may come every week or it may be a month before he comes" (Tr. 239).

that he did not have the authority to examine the authorization cards, verify the signatures and recognize that the cards represented a majority of the employees. Surely, if any good faith doubt of the majority existed Finch would have had the knowledge on which that doubt could be based, as he was the only management official regularly at the store and thus would have the greatest knowledge of the Union campaign in that unit. That Finch had the authority to recognize the Union is demonstrated by the fact that after he reported the Union activity to the Company he was authorized to speak to the employees on June 7 and to conduct the employee poll. To hold that Finch possessed all of the authorities listed above, but not the authority to recognize the Union, "would provide a simple means for evading the Act by a division of corporate personnel functions." *Allegheny Pepsi-Cola Bottling Co.* v. *N.L.R.B.*, 312 F. 2d 529, 531 (C.A. 3). Moreover, the Company never disavowed Finch's action until the instant proceeding and offered no evidence at the hearing, other than attorney Kesseler's telephone conversation, that Finch lacked the requisite authority (R. 41). Respondent's defense of a lack of authority is, accordingly, without merit. See *Permacold Industries, Inc.*, 147 NLRB 885, 886; *N.L.R.B.* v. *Quaker City Life Ins. Co.*, 319 F. 2d 690, 692-693 (C.A. 4).

Finally, argues respondent, it was entitled to withhold recognition from the Union because it entertained a good faith doubt of the Union's majority status. It is settled law, however, that "when an employer makes his own examination of the authoriza-

tion cards and is convinced of their identity and validity, * * * a subsequent refusal to recognize the union is adequate affirmative evidence of a lack of a good faith doubt as to majority status." *Retail Clerks Union, Local 1179* v. *N.L.R.B.*, *supra*, 376 F. 2d at 190. As Finch examined the cards, acknowledged the Union's majority status, and executed the recognition agreement, respondent's assertion of a good faith doubt must fail. *N.L.R.B.* v. *Mutual Industries, Inc.*, *supra*, 66 LRRM 2360; cf. *N.L.R.B.* v. *Hyde*, *supra*, 339 F. 2d at 571 (C.A. 9). Indeed, the Company made no effort to satisfy its bargaining obligation. Despite the Union's demands for bargaining sessions on specific dates in its letter of June 21, no meetings were arranged. Instead, respondent embarked on a course of conduct which belies any contention that its refusal to bargain was motivated by good faith. The Company made no effort to speak with Union officials or to challenge their claim of majority even though the Union demanded bargaining sessions. Kesseler, in his conversation with Turner and Finch on the telephone, expressed no doubt of the Union majority (Tr. 131-133). Neither did President Kase in his temporizing letters of June 15 and July 7. In fact, the first notice from the Company that it would claim a doubt of majority came on July 12, over a month after the bargaining demand, when Vetterlein told Alexander that the recognition problem would have to be solved before they could get to bargaining.

Nor may respondent defend its refusal to bargain by reliance on the poll conducted by Finch or on the letter it received from some of the employees. With

respect to the poll (*supra*, pp. 3-4), the record shows that the ballots were not all distributed and returned to Finch until June 10, the day *after* the critical date, i.e., the date the recognition agreement was signed. Moreover, it was not until June 14, five days after the critical date and two days after Robinson's speech about comparative wage rates with or without the Union, that the so-called "disavowal letter" was sent to the Union. The law is clear that

> . . . . an employer may not set up as a justification for its refusal to bargain with a union the defection of union members which it had itself induced by unfair labor practices, even though the consequence is that the union no longer has the support of a majority. In such circumstances the employer will be required to bargain notwithstanding the union does not presently have a majority.

N.L.R.B. v. *Idaho Egg Producers, Inc.*, 229 F. 2d 821, 823 (C.A. 9). And the result would be the same even if the "disavowal letter" were not the product of the Company's 8(a)(1) violation, for coercive activities undertaken by an employer to dissipate a union's majority status "is not the only kind of employer conduct the Act was designed to prevent." *Retail Clerks Union, Local 1179* v. *N.L.R.B.*, *supra*, 376 F. 2d at 191. For it is just as "inconsistent with the policy and purpose of section 8(a)(5) of the Act" for an employer to refuse recognition in order to "gain time for the employees to reconsider their decision to have the Union as their bargaining representative." (*ibid.*).

See also, *Sakrete of Northern California, Inc.* v. *N.L.R.B.*, *supra*, 332 F. 2d at 909.

CONCLUSION

For the reasons stated, the Board's order should be enforced in full.

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National Labor Relations Board.

November 1967.

CERTIFICATE

The undersigned certifies that he has examined the provisions of Rules 18 and 19 of this Court, and in his opinion the tendered brief conforms to all requirements.

MARCEL MALLET-PREVOST
Assistant General Counsel
National Labor Relations Board

APPENDIX A

Pursuant to Rule 18.2(F) of the Rules of the Court

BOARD'S EXHIBITS

No.	Identified	Received
1-A through 1-L	4	5
2	5	5
3	6	6
4	7	7
5	7	7
6	8	8
7	8	8
8 through 18	9	9
19	71	71
20	72	72
21	331	332

COMPANY'S EXHIBITS

1	14	14
2	29	30
3	58	58
4	119	119
5-A through 5-K	158	185
6	178	185

UNION'S EXHIBITS

1	279	280

APPENDIX B

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C., Secs. 151, *et seq.*) are as follows:

Rights of Employees

Sec. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8(a)(3).

Unfair Labor Practices

Sec. 8. (a) It shall be an unfair labor practice for an employer—

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7; * * *

* * * *

(5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 9(a).

* * * *

☆ U. S. GOVERNMENT PRINTING OFFICE; 1967 281357 377

No. 21,909

IN THE

United States Court of Appeals

For the Ninth Circuit

NATIONAL LABOR RELATIONS BOARD,
Petitioner,

vs.

SONORA SUNDRY SALES, INC.,
d/b/a VALUE GIANT,
Respondent.

BRIEF FOR THE RESPONDENT

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PERNAU WALSH PRINTING CO., SAN FRANCISCO

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No. 21,909

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BRIEF FOR THE RESPONDENT

JURISDICTION

This case is before the Court on the petition of the National Labor Relations Board for enforcement of its Decision and Order issued against Respondent Sonora Sundry Sales, Inc., d/b/a Value Giant, on November 1, 1966. The Board's Decision and Order are reported at 161 NLRB No. 53. In its Answer, Respondent has denied the commission of any unfair labor practices, and has requested that the Court deny enforcement of the Board's Order. The Court has jurisdiction of this proceeding under Section 10(e) of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C., Section 151,

et seq.), the events in this case having occurred in Sonora, California, within this judicial district.

COUNTERSTATEMENT OF THE CASE

A. Questions Presented to the Court.

This is a proceeding in which the Board seeks to compel an employer to engage in collective bargaining with a labor union in the absence of an election and through the mechanism of a check of membership applications executed by the employees in question. The issues raised by Respondent are the following:

(1) It is Respondent's position that the Union membership applications were tainted or invalidated by a material misrepresentation of the Union organizer in obtaining them from the employees. The misrepresentation was that every employee was told that the membership application cards would be kept secret in the Union's files and would never be shown to the Employer. By reason of such misrepresentation, the membership applications cannot be used as a basis for compelling the Employer to engage in collective bargaining with the Union through means of a card check by the Employer, or as a basis for finding the Employer in violation of Sections 8(a)(5) and (1) of the Act for failing to so bargain.

(2) It is Respondent's further position that it was justified in not bargaining with the Union by reason of a good faith doubt as to whether the Union represented a majority of its employees and whether the membership application cards represented the true

views of its employees. This doubt was created by a written secret ballot taken virtually concurrently[1] with the Union's demand for recognition in which eleven out of twelve of the employees in the unit (the twelfth ballot being unmarked) told the Employer that they wished the question of union representation determined by a secret ballot election held by the National Labor Relations Board and not by a card check or examination of union membership applications by the Employer. This doubt was reenforced five days later when a majority of the employees in the unit signed a letter to the Union, requesting the return of their membership applications and demanding a secret ballot election on the question of union representation. A copy of this letter was sent to the Company by the employees.

(3) A further question presented for the Court is whether a speech to the employees by Robinson, a retail supervisor of the Employer's parent company, on June 12, 1965 threatened a reduction in wages if the employees were under a union contract, and thereby violated Section 8(a)(1) of the Act. Respondent contends that on the facts shown in this record (and as found by the Trial Examiner and the Board) no such threat of a reduction in wages was made or implied by Robinson. His remarks were pro-

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[1]The Union request for recognition was made in a meeting between the Employer's store manager and the union organizers on the afternoon of June 9, 1965. The ballots were distributed to the employees by the Employer on the morning of June 9, and were returned by the employees to the store manager over the two-day period June 9 and June 10, 1965.

tected as free speech under Section 8(c) of the Act, and there was no violation of Section 8(a)(1).

B. Supplemental Factual Statement.

Respondent does not desire to controvert the statement of facts presented by the Board in its opening brief. However, in view of the issues presented by Respondent to the Trial Examiner, the Board and this Court, there are some factual omissions in the statement which should be supplied.

(1) Store Opening.

The Employer's operation in this proceeding is a small variety or discount-type store in Sonora, California. At the time the events occurred in 1965, the Employer's parent company also operated similar type stores in Woodland, Watsonville, Livermore and Seaside, California, and Reno and Las Vegas, Nevada. (TR 396-397) It further operated ten concessions in various discount department stores throughout Northern California. (TR 148-150) The Sonora establishment was a new enterprise of the Employer, commencing operations May 27, 1965. From April 20, 1965 it was being remodeled, old merchandise was remarked, new merchandise was received and departments were set up. (TR 178-179) Finch was its manager since April 20, 1965. It was the first time he had ever been manager of a store in actual operation. He had previously worked as a clerk, assistant manager, and as a manager of a concession for the purpose of shutting it down. (TR 178, 186-193, 255-258) He had never had any experience with a store being organ-

ized before, although he was a member of the Union involved in this proceeding, at present on a withdrawal card. (TR 263, 280)

Thus, when the Union came into the picture on June 5, 1965 the store had been open less than a week, a new manager was in charge without prior experience in dealing with the Union during an organizational campaign, and the normal upset of a new store was in full force and effect.

(2) Union Organizational Efforts.

The record in this case would indicate that union organizational efforts commenced on June 3, 1965. Turner and Mierly were the union organizers. Turner testified that the first employees signed up were Richard Cieri, Jayne Casler and one unidentified male employee whose card was not used by the Union since he terminated before the demand for recognition was made. (TR 52-53) The cards of Cieri and Casler are dated June 3, 1965 and it is thus we establish the date. (G.C. Exs. 10 and 17) An examination of all the cards in evidence (G.C. Exs. 8 to 18) would indicate that two cards were signed on June 3, five on June 7 and four on June 8.

Turner testified that he did not recall exactly what he told the employees when signing them up. He usually told employees, however, that they could have an election by the National Labor Relations Board or a cross-check of the cards by an impartial third party. (TR 53-57) He did not mention seeking the check of the cards directly by the Employer, without

a third party. (TR 57) *He told all the employees substantially the same thing when signing them up and told none of them anything materially different from the others.* (TR 61)

Every single employee still with the store at the time of the hearing before the Trial Examiner testified, three as witnesses for the General Counsel and three called by Respondent. They all testified that when asked to sign cards, Turner told them *that their cards would be kept secret by the Union and would never be shown to the Employer.* Not one employee testified differently. (TR 82, 83, 102, 147, 335, 340, 350, 354) The six employees who so testified constituted a majority of the employees in the unit who signed union membership applications.[2]

Although they both testified, neither Turner nor Mierly denied that they told the employees that the membership applications would be kept secret by the Union and would never be shown to the Employer. Furthermore, the Board's brief fails to claim that the misrepresentations were not made. It merely argues that the misrepresentations had no legal significance

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[2]Between June 3 and June 8, 1965, the Union had obtained membership applications from eight out of the twelve store employees. (TR 9-10, 15-17, G. C. Exs. 8-18) The Union had originally obtained eleven authorization cards but three of these (G. C. Exs. 9, 12 and 16) were signed by employees who were no longer in the unit or in the employ of the Company on June 9, 1965, the date on which recognition was requested. (TR 10-11) See Appendix "A" for a tabulation of employees in unit who signed cards, employees no longer in unit who signed cards, employees who signed letter requesting return of cards, and employees who testified at hearing.

with respect to validity of the membership applications. (Board's brief, pages 13-15)

The statement of the union organizers to each employee that the membership applications would be kept secret and never shown to the Employer turned out to be a gross misrepresentation because on June 9, 1965, the next day after the last cards were signed, the cards were shown to the store manager as part of the recognition demand.

There is a subsidiary representation (or possible misrepresentation) by the union organizers which plays some part in this case. It is clear from the record that at the time that the employees were signed up, the union organizers discussed a "drug" collective bargaining agreement, even though the Sonora store was a variety or discount type establishment. (Resp. Ex. 3) According to Turner, he told the employees he would *attempt* to get the "drug" agreement for them from the Employer. (TR 58-59) However, a number of witnesses, two of them (Cieri and Huckaby) produced by the General Counsel, testified that Turner told them he *would* get the "drug" agreement for them and that they would be working under it after the Union got in. (TR 79, 82, 89, 138) Respondent does not suggest that the statements of Turner concerning the drug agreement constituted improper or illegal organizational technique. However, the use of the drug agreement in the Union's organizing drive explains why the employees were disenchanted and asked for their cards back after they discovered from Robinson's talk on June 12 that

at page 5, lines 12 to 15 of his Decision (R 5) that Finch questioned whether he *could* or should sign the document handed him. This finding likewise was not overturned by the Board.

We suggest that there is substantial evidence in the record to support the unreversed factual finding of the Trial Examiner that the union organizers were told by Kessler that Finch did not have any authority to sign any documents on behalf of the Company, including a recognition agreement. The resolution by the

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264) Turner testified that Finch did not tell him he lacked authority to sign a recognition agreement, but only told him he lacked authority to sign a collective bargaining contract. (TR 34, 37-38, 40, 45-46) The same conflict appears with respect to Turner's telephone conversation with Kessler, the Company's attorney. Kessler testified that he told Turner over the telephone that Finch did not have authority to sign anything and that all papers should be sent to the Company's headquarters in San Francisco. (TR 116-117, 122, 123, 125, 129, 134) Turner admitted he discussed Finch's lack of authority with the attorney, but again made the distinction between Finch's authority to sign a recognition agreement and lack of authority to sign a collective bargaining agreement, and stated that the attorney only discussed the latter. (TR 21-22, 49-51, 62) This conflict of testimony was resolved by the Trial Examiner in favor of the Employer's witnesses and finding that they told Turner that Finch did not have authority to sign any documents. The Board did not reverse or overturn the Trial Examiner's Findings of Fact in resolving these conflicts between the witnesses. It merely stated the Union's position on this conflict and asserted that this was Respondent's position, a clearly incorrect determination.

As a legal conclusion the Board found (R 41) that Finch had ostensible authority to acknowledge the Union's majority showing on behalf of the Employer, but this conclusion is patently incorrect in view of the Trial Examiner's unreversed factual finding that both Finch and Kessler told Turner on June 9 that Finch did not have authority to sign anything, and Kessler told him that Finch did not have authority to recognize the Union. Such matters had to be handled by the Company officials in San Francisco. Individual "A" cannot appear to individual "B" to have ostensible authority to perform an act on behalf of his employer when "B" has been told both by "A" and the attorney for "A" 's employer that "A" has no such authority in fact.

Trial Examiner of the conflicting testimony in this respect, while adverse to the General Counsel, is equally as binding on the General Counsel as is the Trial Examiner's resolution of the conflicting testimony on the sequence of events of the June 9 meeting, which was adverse to Respondent. None of these factual findings were reversed by the Board.

SUMMARY OF RESPONDENT'S ARGUMENT

(1) The Alleged Violation of Section 8(a)(1) of the Act.

On June 12, 1965, retail supervisor Robinson of the Employer's parent company, made a speech to the employees at the Sonora store. There were minor conflicts of testimony concerning the statements made in his talk. The Trial Examiner made factual findings concerning Robinson's speech, holding in general that it compared Respondent's wages and working conditions with those pertaining under the Union's discount store agreement. He found no illegal threats or promises and held that Respondent had not violated Section 8(a)(1) of the Act by reason of Robinson's talk. The Board in its Decision did not reverse or overturn the Trial Examiner's factual findings with respect to Robinson's talk. Instead, it summarized in shorter form the substance of Robinson's talk (its summary not differing in substance materially from that of the Trial Examiner). However, the Board concluded that Robinson's speech contained a threat that execution of a union contract would result in decreased wage rates for the employees and that this alleged

threat violated Section 8(a)(1) of the Act. The determination of the Board was erroneous for the following reasons:

(a) Robinson's talk to the employees on June 12, 1965 contained no threats or promises, and was protected as free speech by reason of Section 8(c) of the National Labor Relations Act. The recent decision of this Court in *NLRB v. TRW-Semiconductors, Inc.*, ... F. 2d ....., 66 LRRM 2707 (November 24, 1967) supports Respondent's position in this respect.

(b) In neither the Trial Examiner's factual summary nor the Board's factual summary of Robinson's speech is there any finding of fact or implication that Robinson told the employees that their wage rates would be decreased if a union contract was executed. Their summary of Robinson's speech, as well as the testimony at the hearing, makes it clear that Robinson was comparing the Employer's existing wages and working conditions with those prevailing under the Union's discount store agreement. This is not unlawful propaganda during a union's organizational campaign. The Board's finding that Section 8(a)(1) of the Act was violated by Robinson's speech is not supported by substantial evidence in the record.

(c) The Board's finding that Robinson threatened that execution of a Union contract would result in decreased wage rates is at variance with the complaint against Respondent. There is no such allegation in the complaint. The complaint alleges in paragraph VI thereof (R 6) that on or about June 9, 1965 Robinson informed employees that they would not receive a

projected wage increase if they selected the Union to represent them in collective bargaining. There was no testimony presented at the hearing in support of this allegation of the complaint. Robinson did not talk to the employees on June 9, 1965. His only appearance was on June 12, 1965. Furthermore, no witness testified that Robinson told employees they would not receive a projected wage increase if they selected the Union to represent them in collective bargaining. Neither the Trial Examiner nor the Board in their factual findings suggests that Robinson made any such statement. What the Board concluded, contrary to the Trial Examiner, and contrary to the testimony, is that Robinson's speech contained a threat that execution of a Union contract would result in decreased wage rates, but no allegation of any such threat was contained in the complaint. In other words, the complaint alleged one type of threat concerning which there was no testimony, proof or finding by the Board, and the finding of the Board concerned a type of threat concerning which there was no allegation in the complaint nor any proof in the record or in the factual findings.

(2) The Alleged Violation of Section 8(a)(5) of the Act.

Contrary to the Trial Examiner, the Board found that Respondent violated Section 8(a)(5) of the Act and illegally refused to engage in collective bargaining with the Union following the store manager's examination of the union membership applications on the afternoon of June 9, 1965. This determination is erroneous for the following reasons:

(a) Even though a majority of the employees in the appropriate unit executed membership applications in the Union, these applications were tainted or invalid because they were obtained through misrepresentation by the union organizers. By reason of the misrepresentations the membership applications do not constitute a clear demonstration that a majority of the employees desired the Union and such tainted applications cannot support a conclusion that the Employer illegally refused to bargain with the Union. The misrepresentation consisted of the union organizers talking to the employees in terms of having a National Labor Relations Board secret ballot election or a card check by a neutral third party *and promising the employees that their cards would be kept in the union files and would never be shown to the Employer.* In view of such a promise made to all the employees who signed the membership applications, the Union cannot turn around the following day and claim representation rights by reason of showing the cards to the Employer's store manager.

As a factual matter, this type of misrepresentation should invalidate the membership applications as the basis of a refusal to bargain finding since we cannot hypothesize whether or not the employees would have signed the applications in the absence of such a representation.

As a legal matter, in a case involving a similar type of misrepresentation, the United States Court of Appeals for the Eighth Circuit has held that the NLRB was not warranted in finding that the employer vio-

lated Section 8(a)(5) of the Act by refusing to bargain collectively with a union which relied on authorization cards obtained through such misrepresentations. *(Bauer Welding & Metal Fabricators, Inc. v. NLRB* [8th Cir. 1966] 358 F.2d 766, 62 LRRM 2022)

(b) The union organizers requested recognition of Finch, the store manager, on the afternoon of June 9, 1965. In a secret ballot issued to the employees that morning, returned by them to the Employer on June 9 and June 10, the following day, they voted that they preferred the question of union recognition to be determined by a secret ballot election rather than by a check of the union membership applications by the Employer. This vote was by eleven out of twelve of the employees in the unit, the twelfth employee leaving the ballot blank. The ballots were in written form, but they were secret and the employees were instructed not to sign their names. These ballots created a doubt in the Employer's mind as to whether the membership applications reflected the true feelings of the employees concerning the Union. If the employees truly desired a union, why were they insistent on a secret ballot election rather than a determination of that question by an examination of their membership applications? In the face of the ballots, the Employer was justified in not recognizing the Union until the representation question was determined by a secret ballot election. Otherwise the Employer would be flouting the expressed desire of the employees.

Furthermore, within five days after the Union's request for recognition a majority of the employees in

the unit signed a letter to the Union requesting return of their membership application cards and demanding a secret ballot election on the question of representation. They sent a copy of this letter not only to the Union but also to the Employer. This further solidified the doubt of the Employer as to whether the Union truly represented its employees and whether the membership applications were an accurate reflection of the employees' real desires concerning union representation.

(c) Even though in his meeting with the union organizers on the afternoon of June 9, 1965 Finch, the store manager, signed two documents, one a brief agreement recognizing the Union and the other an even briefer agreement acknowledging that the Union represented a majority of the employees, neither of these documents should be considered legally significant. The store was in its first week of operation and Finch was a new store manager with no prior experience as a store manager and no prior experience in dealing with a union organizational campaign. As the Trial Examiner found (and his findings were not reversed by the Board), Kessler the Employer's attorney, told the union organizer in a telephone conversation during the meeting that Finch had no authority to sign any documents on behalf of the Company or to recognize the Union, and that these documents should be sent to San Francisco. Whatever the scope of Finch's authority might have been under other circumstances, here the Union was put on notice during the meeting that Finch did not in fact have authority to sign a recognition agreement.

ARGUMENT

I

THE BOARD ERRONEOUSLY FOUND THAT ROBINSON'S SPEECH VIOLATED SECTION 8(a)(1) OF THE ACT.

A. The Complaint Lacks Any Allegation Concerning the Alleged Violation.

The complaint alleges in paragraph VI that on or about June 9, 1965 Robinson informed the employees at Sonora that they would not receive a projected wage increase if they selected the Union to represent them in collective bargaining. (R 6) No testimony was offered at the hearing to sustain this allegation of the complaint. Furthermore, neither the Trial Examiner nor the Board made any findings of fact or law that Robinson had engaged in such activity. As indicated above, Robinson was not at Sonora on June 9, but rather made his talk to the employees on June 12. His talk did not contain any such statement, and furthermore the record fails to disclose any such projected wage increase. The allegation of the complaint is completely unfounded and neither the Trial Examiner nor the Board has suggested that there was any merit to it.

The Trial Examiner, of course, found no violation with respect to Robinson's speech to the employees on June 12. The Board, however, concluded that Robinson's speech contained a threat that execution of a union contract would result in decreased wage rates for the employees and that this threat violated Section 8(a)(1) of the Act. (R 42) Aside from the substantive issue of whether Robinson's speech contained such a threat, we suggest that the Board cannot find

a violation of the Act with respect to a matter never alleged in the complaint. The complaint is not only completely silent upon the subject matter of this alleged violation, but there was no attempt to amend the complaint to conform to the proof. Section 102.17 of the Board's Rules and Regulations provides as follows:

> "SEC. 102.17 *Amendment.*—Any such complaint may be amended upon such terms as may be deemed just, prior to the hearing, by the regional director issuing the complaint; at the hearing and until the case has been transferred to the Board pursuant to section 102.45, upon motion, by the trial examiner designated to conduct the hearing; and after the case has been transferred to the Board pursuant to section 102.45, at any time prior to the issuance of an order based thereon, upon motion, by the Board."

Thus, the complaint could have been amended prior to the hearing by the regional director who issued the complaint, at the hearing upon motion to the trial examiner, and after the hearing upon motion to the Board. Yet no request was made to amend. Under these circumstances the Board's determination finding a violation of Section 8(a)(1) should not be sustained when the matter has never been alleged. This is more than a matter of elementary fairness. The courts and the Board have ruled that matters unalleged in a complaint may not be held to constitute an independent violation of the Act. *The Columbus Showcase Company,* 111 NLRB 206 (1955); *I.F. Sales Company,* 82 NLRB 137, 138 (Footnote 6) (1949); *NLRB v.*

H.E. Fletcher Co. (1st Cir. 1962) 298 F.2d 594; *Engineers & Fabricators, Inc. v. NLRB* (5th Cir. 1967) 376 F.2d 482.

In *Fletcher,* the Court said:

> "We believe it would derogate elemental concepts of procedural due process to grant enforcement to such a finding. As was stated in Douds v. International Longshoremen's Ass'n, 241 F.2d 278, 283 (2 Cir 1957): 'The Complaint, much like a pleading before a court, is designed to notify the adverse party of the claims that are to be adjudicated so that he may prepare his case, and to set a standard of relevance which shall govern the proceedings at the hearing.' Where the Board improperly makes its finding on a charge not contained in the complaint, and the record discloses that the basis of this finding has not been litigated at the hearing, such finding is not entitled to enforcement, see, National Labor Rel. Bd. v. Bardley Washfountain Co., 192 F.2d 144 (7 Cir 1951)". (298 F.2d 594, 600)

Thus, aside from the merits of the issue, the finding of the Board that Respondent violated Section 8(a)(1) of the Act should be set aside on the ground that the matter has never been properly pleaded or alleged pursuant to the rules and regulations of the Board.[4]

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[4]The Board points out in Footnote 3 to its decision that the complaint did not allege violations of the Act based upon a speech by Finch on June 7, 1965, the poll taken by Respondent concerning the employees' desires for an election or a card check on June 9, 1965, or a wage increase which Respondent granted in all its stores, including the Sonora store, on July 17, 1965. The Board said that although these matters were brought up at the hearing, they were not litigated sufficiently fully to warrant

B. The Board's Conclusion That Robinson, on June 9 Threatened Employees That Execution of a Union Contract Would Result in Decreased Wage Rates Was Erroneous As a Matter of Fact and As a Matter of Law.

It is clear from the record that Robinson, a retail supervisor of Ames Mercantile Company, the Employer's parent company, spoke to the Sonora employees about the Union at a meeting on June 12, 1965. Robinson was scheduled to be at the Sonora store on that day and the Company's president asked him to speak to the employees about the Union. The background for his speech was that the Union had asked for recognition on June 9 and further, in its organizational campaign, the Union had discussed with the employees a "drug" collective bargaining agreement. (Resp. Ex. 3) There was conflict between the union organizer Turner and the employees over what was said concerning the "drug" agreement. According to Turner, he told the employees he would attempt to get the "drug" agreement for them from the Employer. (TR 58-59) However, a number of employee witnesses testified that Turner told them he *would* get

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basing any findings of violations of the Act thereon. (R 42) We suggest that the Board's finding that Robinson threatened employees that the execution of a union contract would result in decreased wage rates stands on no better basis. There is no reason to distinguish it from the other matters which were not alleged in the complaint nor fully litigated. For example, in the Trial Examiner's conclusions (R. 21) he refers specifically to Robinson's speech and finds no evidence that the employees were told that they would not receive a projected wage increase if they selected the Union to represent them. This is the issue which the complaint alleged in paragraph VI, concerning which there was no evidence. On the other hand, the Trial Examiner does not mention one way or the other any allegation that Robinson had threatened employees with a wage reduction if they were under a union contract. This conclusion appears for the first time in the Board's decision.

the "drug" agreement for them and that they would be working under it after the Union got in. (TR 79, 82, 89, 138) The Employer had referred previously to the Union's organizational tactics concerning the drug agreement in a memorandum dated June 9, 1965 which was handed to all employees with the ballots on June 9, 1965. (Resp. Ex. 6) In this memorandum the Company's president pointed out that the contract which the employees had been handed by the union representative during the organizational campaign, and the wage rates contained within it, did not apply to the Company's type of retail operation. Rather, that contract covered the drug industry, which included a prescription pharmacy, and the Employer did not now have nor intend in the future to have a prescription pharmacy on the premises.

With this background in mind, Robinson spoke to the employees on the morning of June 12, 1965. He and Finch, the store manager, as well as employees Huckaby, Modrell and Cieri, testified concerning the meeting.[5] Most of this testimony was in accord although there was some mild conflict. With respect to this testimony the Trial Examiner made the following factual findings:

> "On Saturday, June 12, 1965, Russell Robinson, retail supervisor for Ames Mercantile Company, spoke to the employees of Respondent at 8:00 A.M. They had been told the day before by store manager Finch to report to the store an hour early for this meeting. Robinson was intro-

[5]Cieri testified that he did not remember anything particularly about the June 12 meeting. (TR 88-89)

duced by Finch, who told the employees that Robinson was there to acquaint them with the union situation from the Company's point of view, and that he was in no way advising them whether or not they should join the Union. Robinson stated that he understood they had all signed union cards, and that it was entirely up to the employees if they wanted a union or not; that he could not tell them to join the Union or not, and that there would be no reprisals of any kind if they did, but that he did feel they had been shown the wrong contract by the union representative; that he did not think Ames Company would sign a 'drug contract' because Respondent did not have a prescription counter and never would have one; that the other Ames stores that did have a union were under a discount or variety store contract. He stated that the beginning wage, under the discount store agreement, was $1.35 per hour whereas they were currently receiving $1.40 an hour. One employee asked whether they could get their cards back from the Union, and he replied that they could contact the Union and ask for the cards if they wanted to, but any action they took would be completely on their own. He told them that whether they realized it or not, they had given the Union the right to picket the store by signing the cards. An employee asked about the $1.50 wage rate he thought they were to get when the store opened, and Robinson said that that was a misunderstanding, and that he wanted to get the matter straight as to the wage policy; that the employees of Value Giant Stores start at $1.40 per hour, get a pay increase to $1.50 after a period of 65 days and an increase to $1.70 after one year; that if they joined the Union in

> the meantime, then, under the discount store contract, it would take them longer to build up to the top pay than it would under Respondent's pay increase program. He also informed them of the Company's program or policy on health and welfare, sick pay and holidays."
>
> (R 17-18)

From these factual findings concerning the June 12 meeting, the Trial Examiner reached the following conclusions:

> "Respondent attempted to convince the employees that the 'drug agreement' would not be an appropriate agreement form for the Sonora store, and Respondent balloted employees on the issue of representation by secret election or by card check. Respondent represented to employees that a discount store agreement would be the type that the Sonora store would fall under, and that wage rates would be better and top pay reached more quickly under Respondent's pay program than under the discount store agreement. I find that Respondent's representations come within the scope of Section 8(c) of the Act, and that the ballotting was objectively conducted, and under the circumstances of this case, not an unfair labor practice. I find no evidence that employees were told that they would not receive a projected wage increase if they selected the Union to represent them."
>
> (R 21)

From the factual dissertation of the Trial Examiner concerning Robinson's speech on June 12 it will be seen quite clearly that he in no way suggested that

the employees would get a wage decrease if the union contract were signed, specifically if the discount store contract were signed. All he did was legitimately point out that under Respondent's existing pay program the employees went from a starting rate of $1.40 per hour to the top rate of $1.70 per hour after one year and that if they joined the Union in the meantime, then under the discount store contract it took longer to build up to the top pay than it would under Respondent's wage program. This is perfectly permissible propaganda, protected as free speech under Section 8(c) of the Act. He was merely comparing the Employer's existing program with that which prevailed under the Union's discount store agreement. This does not imply a wage deduction, much less expressly threaten one. It merely points out that the Respondent's existing program is better than the union contract.

The factual findings of the Trial Examiner concerning the June 12 meeting were not overturned or reversed by the Board. Instead, the Board made its own factual finding which in briefer form covered the exact same subject matter as the Trial Examiner's factual findings. The Board's factual findings concerning the June 12 meeting are as follows:

> "On June 12, Robinson, a representative of Ames Mercantile Company, Inc., of which the Respondent is a subsidiary, in an address to the employees here involved, stated that he understood they had all signed cards; that he did not think Ames would sign a 'drug contract' because the Respondent did not have a prescription coun-

> ter, and other Ames stores had a 'variety store contract'; that the beginning wage under the latter contract was $1.35 an hour whereas the employees were currently receiving $1.40; and that, if they joined the Union, it would take them longer to build up to top pay than it would without a union. Robinson also referred to the various benefits available to the employees."
>
> (R 40)

It will be seen from an analysis of the factual findings that the Board itself does not state or imply that Robinson threatened employees with a reduction in wages if they were under the union agreement. He merely compared the Employer's existing wage schedule with the schedule in the union agreement. The Employer's existing schedule had a $1.40 starting wage where the Union's variety store contract or discount store contract had a $1.35 starting rate. Also, it took longer to build up to top pay under the Union's variety store agreement than it did under the Company's wage schedule without a union. Again, this type of comparison is perfectly legitimate propaganda during a union's organization campaign. The employer can point out to the employees that he has a better wage schedule than the union has in its contract. If an employer cannot do this, Section 8(c) has little meaning.

From the above factual finding, the Board concluded that Robinson threatened that execution of a union contract would result in decreased wage rates. This is not a fair import of his remarks, whether we take the Trial Examiner's detailed factual findings or

the Board's briefer and more general factual findings. The Board is straining to extract a threat out of Robinson's proper remarks.

Let us put ourselves in Robinson's shoes. Here he was addressing a group of employees and he knew that the Company's own wage schedule was superior to the wage schedule in the appropriate union agreement. How else could he express this thought to the employees except to say that this is what you now have, and this is what you would have if you were under the union agreement? The comparison was odious, so far as the Union was concerned, but it was perfectly truthful and did not contain any element of threat. It merely showed, as the Union's present agreement then read, that the employees were better off under the Company's wage schedule.

We suggest that the Board's finding that Robinson threatened the employees with a wage reduction if they joined the Union and came under the union contract is not supported by substantial evidence upon this record.

We respectfully call the Court's attention to its recent decision issued November 24, 1967 in *National Labor Relations Board v. TRW-Semiconductors, Inc.* (9th Cir. 1967) ..... F. 2d ....., 66 LRRM 2707. In that decision this Court held that strong anti-union propaganda was permissible as free speech under Section 8(c) of the Act during a union's organizational campaign. The propaganda in that case involved predictions (1) that unionization would disrupt harmonious relations and would probably pro-

duce strikes with resulting wage loss and possible violence; (2) that labor troubles would aggravate the company's serious financial problems; (3) that present and future wages and benefits would be subject to collective bargaining, and (4) that unionization could subject the employees' job security to the whims of union leaders. The company mentioned rumors that people who didn't vote properly, i.e., in favor of the union, would find their tires slashed and would get roughed up or beaten up. If such strong and almost vicious propaganda is permissible as free speech by an employer during the union's organizational campaign, then certainly Robinson's much milder and extremely innocent remarks comparing the Company's present benefits with those prevailing under the appropriate union agreement must be equally protected as free speech under Section 8(c) of the Act.[6]

The Board has ruled to the same effect in *Belknap Hardware & Manufacturing Co.*, 157 NLRB No. 113, 61 LRRM 1541 (1966). There an employer's speech to employees (that went to far greater extremes than anything Robinson allegedly said), was held to be privileged. In *Belknap* the employer told the employees, among other things:

> (a) "The union cannot guarantee a job, steady work, a wage increase, or more benefits.

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[6]See also *NLRB v. Golub Corp.* (2nd Cir. 1967) ..... F.2d ....., 66 LRRM 2769, where the Court discussed the history of Section 8(c) of the Act and held that an employer prediction of more unfavorable relationships under a union contract was not a threat and did not violate the law.

'The only thing the Teamsters Union can really guarantee you is trouble and that they will be around on pay day to get their hands in your pockets and in your pay checks.' Unions cannot exist without trouble and without the money they collect from employees.

(b) "Not only will there be no automatic wage increases or other benefits if the Union wins the election, but just exactly the opposite is true.

(c) "Voting for a union does not automatically bring any increases or any benefits or any job security to you. If this Union were to win the election tomorrow there would still be only one way that it could try to force us to agree to any of its demands which we thought were unreasonable or which we otherwise couldn't see our way clear to agree to. That would be by pulling you out on strike.

(d) "The Union organizer says that if the Teamsters Union wins the election they will 'attempt to negotiate with Belknap the Teamsters pension plan.' If the Union organizer thinks for one moment Belknap would agree to seeing the pension plan we now have and to which we have already contributed several million dollars go down the drain, he is badly mistaken and even more stupid than we think he is."

The above is just a smattering from the employer's speech in *Belknap,* but it shows the general tones of the statements made. Yet the Board found the speech to be privileged under Section 8(c) of the Act and no grounds for setting aside an election. Compared

with *Belknap,* Robinson's remarks to the employees in this proceeding were innocent and angelic in comparison. Obviously, he committed no Section 8(a)(1) violation.

We request the Court to set aside the Board's determination that Robinson's speech violated Section 8(a)(1) of the Act.

II

THE BOARD ERRONEOUSLY DETERMINED THAT RESPONDENT VIOLATED SECTION 8(a)(5) OF THE ACT IN REFUSING TO BARGAIN WITH THE UNION.

Respondent recognizes the general rule established in this and other Circuits that an employer has no absolute right to demand an election. Where a union has obtained authorization cards signed by a majority of the employees in an appropriate unit, an employer, absent a good faith doubt of the union's majority, violates Section 8(a)(5) of the Act if he refuses to bargain with the union. *Snow v. NLRB* (9th Cir. 1962) 308 F. 2d 687; *NLRB v. Trimfit of California, Inc.* (9th Cir. 1954) 211 F. 2d 206; *Sakrete of Northern California, Inc. v. NLRB* (9th Cir. 1964) 332 F. 2d 902, cert. denied, 379 U.S. 961; *NLRB v. Kellogg's, Inc.* (9th Cir. 1965) 347 F. 2d 219; *NLRB v. Security Plating Company, Inc.* (9th Cir. 1966) 356 F. 2d 725; *Retail Clerks Union, Local 1179 v. NLRB (John P. Serpa, Inc.)* (9th Cir. 1967) 376 F. 2d 186; *NLRB v. Hyde* (9th Cir. 1964) 339 F. 2d 568; *NLRB v. Idaho Electric Co.* (9th Cir. 1967) 384

F. 2d 697, 66 LRRM 2393; *NLRB v. Luisi Truck Lines* (9th Cir. 1967) ..... F. 2d ....., 66 LRRM 2461; *NLRB v. Mutual Industries, Inc.* (9th Cir. 1967) 382 F. 2d 988, 66 LRRM 2359; *Joy Silk Mills v. NLRB* (D.C. Cir. 1950) 185 F. 2d 732, cert. denied 341 U.S. 914.

In the instant case there is no question but that the Union had obtained signed membership applications from a majority of employees in the appropriate unit by the day it requested recognition. Recognition was requested on June 9, 1965. As the Board points out in its opening brief (page 2) between June 3 and June 8, 1965 the Union solicited and obtained membership applications from eight out of the twelve store employees.

However, just as the Employer does not have an unqualified right to insist upon an election before recognizing the Union, neither does the Union have an unqualified right to insist that the Employer recognize it and engage in collective bargaining upon the basis of having obtained membership applications from the employees. The Union's right is likewise subject to qualifications. *First,* it does not have a right to insist on recognition and bargaining based on authorization cards if the Employer has a good faith doubt that the Union represents a majority of the employees or that the membership or authorization cards truly reflect the views of the employees. *Second,* if the Union organizers obtain the membership applications or authorization cards from the employees by improper means, such as material misrepresentations,

the membership applications are tainted and invalid and cannot be used as a basis for requiring the Employer to recognize and bargain with the Union in the absence of an election. Both of these qualifications are present in the instant case.[7]

A. The Union Obtained the Membership Applications by Means of a Material Misrepresentation to the Employees, Thus Precluding the Use of the Applications As a Means to Compel the Employer to Recognize and Bargain With the Union in the Absence of an Election.

The record is clear that each employee was told that the membership applications would be kept secret in the union files and would never be shown to the Employer. In this connection there is also a strong implication in the record that the employees were told that the cards might be used to obtain an election or a cross-check by an impartial outsider. Turner, the Union organizer, testified that he did not recall exactly what he told the employees when signing them up, but he usually told them that they could have an election by the National Labor Relations Board or a cross-check of the cards by an impartial third party. (TR 53-57) He did not mention to them seeking a check of the cards directly by the Employer without a third party. (TR 57) He also testified that he told all employees substantially the same thing when signing them up, and told none of them anything materially different from the others.

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[7]Other circumstances, such as obtaining the membership cards or authorizations by means of coercion might also invalidate the cards as a basis for compelling the employer to recognize the union, but no such element as coercion was present in the instant case.

(TR 61) It is therefore a fair assumption from the record that all employees were given the same representations or misrepresentations by Turner and that what he said to one employee he said to all other employees.

Each employee still with the store at the time of the hearing testified, three as witnesses for the General Counsel and three as witnesses for Respondent. From Turner's testimony that he told all the employees the same thing, we can assume that what these six employees were told also applied to the other employees who were no longer with the store at the time of the hearing and who did not testify. These six employees were Huckaby, Cieri, Modrell, Janet Canfield, Billy Canfield, and Casler. Each testified that when asked to sign cards, Turner told them that the cards would be kept secret by the Union and would never be shown to the Employer. None testified differently. (TR 82, 83, 102, 147, 335, 340, 350, 354) Cieri also testified that Turner talked about an election when obtaining his membership application. (TR 102)

Turner did not deny this testimony. He was called before the employees so had not heard their evidence when he testified. However, he was available and could have been recalled. Furthermore, it is consistent with his testimony that he told employees about National Labor Relations Board elections and cross-checks by an impartial third party. Cards would be kept secret and never shown to the Employer under such circumstances. The employees' testimony rings true.

Also Mierly, the other union organizer, testified as a rebuttal witness of the General Counsel after all the employees had testified. He, too, failed to deny that the employees were told their cards would be kept secret and never shown to the Employer.

The statement that the cards would be kept secret and never shown to the Employer turned out, as mentioned previously, to be a misrepresentation because on June 9, the next day after the last cards were signed, the cards were shown to the store manager as part of the recognition demand.

The statement that the cards would be kept secret and would never be shown to the Employer was made in conjunction with an explanation by the union organizer to the employees that recognition might be obtained through a National Labor Relations Board election or through a card check by a neutral outsider. Under these circumstances, the cards are no longer all-purpose in nature, permitting the Union to obtain representation by any method it prefers. A commitment has been made by the Union to the employees that it will seek recognition by some method other than showing the Employer the cards. The Union should not be permitted to avoid such a commitment at its own free will. Otherwise it will benefit from its own chicanery and deceit, possibly at the expense of the employees. Recognition, based on a card check by the Employer, should not be required when the Union has promised the employees that their cards will not be shown to the Employer.

This does not deprive the employees of any rights. They may still want the Union or they may not. But this can be determined in one of the ways suggested by the Union to the employees when it promised their cards would be kept secret; either by a National Labor Relations Board election or by a card check conducted by a neutral outsider.

The Board suggests in its brief (pages 13 to 15) that Turner's misrepresentation to the employees should not invalidate the cards because it bore no relationship to the signer's actual intent—designation of the Union as his collective bargaining representative. The trouble with the Board's argument is that it is based upon pure hypothesis. We do not know for sure whether the employees would have signed the cards in the absence of Turner's misrepresentation. But we do know that it was an inducement made by the union organizer to the employees as part of his campaign to have the membership applications signed. And we can suspect that it was an important inducement. For we know that on June 9 and 10, eleven out of twelve employees told the Employer by secret ballot that they wished the question of Union representation determined by a secret ballot election and not by an Employer check of the cards. These ballots are in evidence as Resp. Exs. 5-5K. (TR 180-186, 220-222, 224, 226, 156-158) We know further that under date of June 14, 1965 nine employees of the Company signed a joint letter to union organizer Turner, asking immediate return of their application cards and demanding a secret ballot election.

(Resp. Ex. 2) Six of these had signed application cards. (G.C. Exs. 8-18) A copy of this letter was sent to the Company's president. (TR 293-294, 304) This letter was written by the employees only five days after the cards were shown to the Employer. Did the employees resent the misrepresentation and breach of faith over the use of the cards? They certainly had a secret ballot on their mind at all times.

Thus, we have not only the Union's misrepresentation that the cards would never be shown to the Employer, but, concurrently with the Union's demand for recognition, the employees' demand for a secret ballot election, plus five days later, their demand for a return of their cards from the Union. When all these facts are put together, it is clear that the cards are invalidated as a means of obtaining recognition from the Employer through his check of the cards. To rule otherwise would be a gross subversion of the expressed desires of the employees.

But we need not rely on a discussion of principle alone. The case of *Bauer Welding & Metal Fabricators, Inc. v. NLRB* (8th Cir. 1966) 358 F. 2d 766, 62 LRRM 2022, is almost directly in point. There the union sought authorization cards from the employees in a letter referring to the holding of a National Labor Relations Board election in terms which the Court found to be "both ambiguous and a skillful attempt at misrepresentation." The letter said (and the Court consistently italicized the words): "Your employer will never see these cards." The Court held

under these circumstances that a Section 8(a)(5) refusal to bargain violation could not be found where the Company refused to recognize the union based on cards alone. The Court reached its conclusion despite massive 8(a)(1) and 8(a)(2) violations on the part of the Company. These included forming and dominating an inside labor organization, threatening to discontinue existing benefits if the union came in, promising new benefits and instituting and sponsoring petitions to get the employees to repudiate the union. No such massive violations are present in the instant case.

With respect to the alleged refusal to bargain in the instant case, the situation is almost identical to that of *Bauer Welding*. In both cases the employees were told that their Employer would never see the cards. In *Bauer Welding* the Union made ambiguous written references to the holding of an NLRB election. In the instant case the union organizer made undefined oral references to the employees about holding an NLRB election, or having a cross-check by a neutral outsider. The principle of *Bauer Welding* should apply here. The cases cannot be distinguished on the refusal to bargain issue.

There are a substantial number of court decisions in various Circuits holding that material misrepresentations by a Union or its organizers to employees will invalidate the use of membership applications or authorization cards as a means of obtaining recognition and bargaining rights from the Employer. See *NLRB v. Freeport Marble & Tile Co., Inc.* (1st Cir.

1966) 367 F. 2d 371, 63 LRRM 2289; *S. E. Nichols Company v. NLRB* (2d Cir. 1967) 380 F. 2d 438, 65 LRRM 2655; *NLRB v. Golub Corp.* (2d Cir. 1967) ..... F. 2d ....., 66 LRRM 2769; *Crawford Manufacturing Co. v. NLRB* (4th Cir. 1967) ..... F. 2d ....., 66 LRRM 2529; *NLRB v. Peterson Bros. Inc.* (5th Cir. 1965) 342 F. 2d 221, 58 LRRM 2570; *Engineers & Fabricators, Inc. v. NLRB* (5th Cir. 1967) 376 F. 2d 482, 64 LRRM 2849; *Peoples Service Drug Stores, Inc. v. NLRB* (6th Cir. 1967) 375 F. 2d 551, 64 LRRM 2823; *NLRB v. Winn-Dixie Stores, Inc.* (6th Cir. 1965) 341 F. 2d 750, 58 LRRM 2475, cert. denied 382 U.S. 830; *NLRB v. Swan Super Cleaners, Inc.* (6th Cir. 1967) 384 F. 2d 609, 66 LRRM 2385; *NLRB v. Koehler* (7th Cir. 1964) 328 F. 2d 770, 55 LRRM 2570; *NLRB v. Morris Novelty Company* (8th Cir. 1967) 378 F. 2d 1000, 65 LRRM 2577.

To allow the Board decision to stand, finding Respondent guilty of illegal refusal to bargain in violation of Section 8(a)(5) would not only subvert the expressed desires of the employees for a secret ballot election and endow the Union with the fruits of its misrepresentations, but would be contrary to the decision of the Eighth Circuit in *Bauer Welding* on the identical issue and would be contrary to decisions of the various Courts of Appeals cited above holding that a union may not obtain bargaining rights and recognition on the basis of authorization cards obtained through material misrepresentations. The decision of the Board on the Section 8(a)(5) issue should be set aside and denied enforcement.

B. When It Refused to Recognize and Bargain With the Union, Respondent Had a Good Faith Doubt As to the Union's Majority Status.

It is Respondent's position that when it refused to bargain with the Union it had a good faith doubt whether the cards represented the true wishes of the employees concerning the Union, and that this doubt was justified by the secret ballot filled out by the employees, and by the letter written by a majority of the employees to the Union requesting return of their cards and a secret ballot election.

(1) The Ballot.

Eleven out of twelve employees (one abstaining) told the Company by secret ballot that they wanted to show their desires regarding union representation by a secret ballot election and did not want the Company to recognize the Union on the basis of a card check without a secret ballot election. Respondent asserts that this constitutes a proper basis to doubt whether the cards represent the true feelings of the employees. The employees who signed the cards are in effect saying to the employer, maybe we want the Union and maybe we don't, but give us a chance to express our views in a secret ballot election, and we do not want you to recognize the Union on the basis of the cards alone. This does not prove that the employees want the Union, or that they do not want the Union. It creates a doubt as to the validity of the cards since the employees are telling the employer that they want an opportunity to express their views as to union representation in secret, and not by an

examination of cards. To disregard the views of the employees under such circumstances would undermine their ultimate freedom of choice.

The ballots were not taken under the safeguards which the NLRB would have imposed in a representation election. But this is not critical. No final status concerning representation or lack of representation by the Union was determined. The ballots merely established whether in good faith there was any reason to doubt the validity of the cards as true measure of the Union's representative status. The near unanimous desire of the employees for a secret ballot election, and not to have recognition of the Union on the basis of cards alone, showed that there was reasonable grounds to doubt the cards as a final and true measure of the employees' feelings concerning the Union.

The Trial Examiner asked at the hearing whether the ballot constituted an interference by the Employer. (TR 398) The answer is clearly "no". The complaint did not allege that the taking of the ballot was an unfair labor practice by the Employer. Furthermore, the Trial Examiner answered his own question and found that the balloting was objectively conducted and under the circumstances of this case was not an unfair labor practice. (Trial Examiner's Decision, page 9, lines 34-36. R 21) The Board did not reverse this finding of the Trial Examiner, pointing out that the complaint did not allege that the balloting or poll was an unfair labor practice by the Employer, and also finding that this issue had not been sufficiently

litigated to find any violation. (See Board's Decision, page 5, Footnote 3, R 42) Thus, it was neither alleged nor found by anyone that the taking of the ballots was an unfair labor practice by the Employer.

We suggest that under no circumstances could the taking of the ballots have been found to constitute an unfair labor practice by the Employer. *First,* neither the charge nor the complaint alleges the balloting to constitute a violation of the Act. The General Counsel introduced no evidence concerning the balloting. He obviously did not think it was a violation. The balloting was introduced into the case by respondent as part of its defense. *Second,* the ballot was conducted under noncoercive conditions. Not only were the mechanics of the voting completely noncoercive, but the written material on the ballots advised the employees that the ballots should not be signed, that the Company did not want to know how any particular individual voted, that the employees were not required to fill out the ballots if they did not so wish, and that there would be no recriminations no matter which way they voted. *Third,* it was not a ballot to determine the employees' views concerning the Union, but only their views concerning a secret ballot election or recognition by card check under the then circumstances. *Fourth,* Court authority suggests the right of an Employer to poll employees when faced with a card check request. In *NLRB v. Glasgow Co.* (7th Cir. 1966), 356 F.2d 476, 61 LRRM 2406, the Court sustained a refusal to bargain based on cards alone where the Court found the Employer had no good

faith doubt concerning the validity of the cards. One ground for the finding of no good faith doubt was that the Employer made no attempt to verify the Union's claim by inquiry to the employees. The Court stated:

> "Here there is no evidence of probative value to justify good faith doubt. In addition to its failure to reveal any reason for their 'belief' the record discloses no action upon the part of Glasgow, Leone, or any other representative of the Company, to attempt to verify the Union's claim through inquiry addressed to the Union *or to the employees.*" (Italics ours) 356 F.2d 476, 479.

In the instant case the ballots constituted a non-coercive inquiry to the employees, exactly what the Court suggested in *Glasgow*. And in *Glasgow* the poll was on the direct question of whether or not the employees wanted the Union. In the instant case, the question was more innocuous. The employees were not asked their views concerning the Union. They were only asked their views as to the method they preferred in determining the Union's majority status, or lack of it. The taking of such a ballot is not a violation of the Act.

In sum, the ballots alone were sufficient to justify the good faith doubt of the Employer as to the lack of validity of the cards as a true measure of the employees' feelings concerning the Union.

(2) The June 14, 1965 Letter of the Employees.

On June 14 a majority of the employees wrote the Union requesting the return of their cards, and de-

manding a secret ballot election. They sent a copy of their letter to the Company. (Resp. Ex. 1) If the ballots alone did not create a good faith doubt in the Company's mind as to the validity of the cards as a test of the employees' feelings concerning the Union, this letter was the clincher. It showed the Employer without question that a majority of the employees had grave doubts concerning the Union and perhaps repudiated it.

It is Respondent's position that either the ballots or the employees' letter alone would have been sufficient to create a good faith doubt as to the Union's majority status and the validity of the cards in demonstrating that alleged status. Together the ballots and the letter are unassailable in justifying and illustrating that doubt.

A copy of the letter was sent to Paul Kase, the Company's president in San Francisco, in an envelope postmarked June 21, together with a covering letter signed by an employee named Tingle. The covering letter referred to the fact that the enclosed letter to Turner was signed by a majority of the employees. Kase testified he received the letter on June 29 upon his return from a vacation trip. (TR 293-294, 304) There is no evidence in the record when the letter was mailed to Turner, but he testified he received the letter, did not return the employees' cards because he no longer had them, and he sent the letter along to his headquarters in Sacramento. (TR 63)

All employees who testified in this proceeding stated they signed the letter. (TR 89-91, 98-101, 136-138,

338-339, 350, 354-356) It was prepared by employees Casler and Tingle on June 14 and other employees thereafter signed it. (TR 355-357) It was not discussed with Finch. (TR 356)

The letter was a direct statement by the employees that they wanted their cards back. This was even stronger justification for the employer's good faith doubt than the ballots. It was a direct indication of employee dissatisfaction with the Union. The Courts and the Board have made it clear that when employees without coercion request the return of their cards, such cards can no longer be the basis for an 8(a)(5) violation. *TMT Trailer Ferry, Inc.,* 152 NLRB 1495, 59 LRRM 1353 (1965); *Reilly Tar & Chemical Corp. v. NLRB* (7th Cir. 1965) 352 F. 2d 913, 60 LRRM 2437; *Phelps Dodge Copper Products Corp. v. NLRB* (7th Cir. 1965) 354 F. 2d 591, 60 LRRM 2550.

(3) Events After June 9, 1965.

On June 9, 1965 Kessler, the Employer's attorney, wrote a letter to Kase, the Employer's president, concerning his telephone conversation the same day with Finch and Turner. He pointed out that he told Turner that Finch had no authority to sign anything and that Turner should get in touch with Kase within the near future, or vice versa. (Resp. Ex. 4) He also told Kase that the Union was claiming majority status as representative of the employees.

Finch testified to the best of his recollection that when he met with union organizers Turner and Mierly on June 9 they left no copies of General Coun-

sel's Exhibits 2, 3 and 4 with him. These were the letter requesting recognition, the recognition agreement, and the acknowledgment that the Union had signed up a majority of the Company's employees. At least he could never find any copies. (TR 205) Turner testified that he believed he left copies, but was sure he took the originals with him. This was true even of General Counsel's Exhibit 2, the letter addressed to the Company requesting recognition. (TR 43)

Kase testified that on June 14 he received copies of General Counsel's Exhibits 2, 3 and 4 in the mail, the last two being unsigned, and he thought he received them from the Union. He did not think he received them from Finch, or that Robinson delivered them to him along with the ballots on that day.[9] (TR 285-287, 298-301, 308-310)

On June 14 or 15, Kase employed Vetterlein, a labor relations consultant, to investigate the situation at Sonora, to contact the Union and generally handle the situation. He did not instruct Vetterlein to recognize the Union and engage in collective bargaining, or not to do so. (TR 292-296, 302-305) He sent Vetterlein copies of the material received in the mail on June 14 (G. C. Ex. 2, 3 and 4), copies of the ballots voted by the employees on June 9 and 10 (Resp. Ex. 5 through 5K), and a copy of the Memorandum written by Finch on June 12. (Union Ex. 1) (TR 319-322)

Kase was asked on cross-examination if he had any doubt on June 14 that the Union represented a

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[9]Kase received the ballots from Robinson on June 14, 1965. (TR 297-298)

majority of the employees at Sonora. He answered that he did have a doubt. (TR 305)

On June 15 Kase wrote Turner that the Sonora situation was being discussed with the company attorneys. (G. C. Ex. 5) This was true because Kessler testified he discussed the situation by telephone with Kase after the latter returned from Medford. Kase had been in Medford the week the events at Sonora occurred. (TR 117, 121)

Kase then went on vacation on Friday night, June 18, and did not return until Monday, June 29.

While he was away Alexander, the Union's Secretary-Treasurer, wrote him by letter dated June 21, 1965 suggesting a number of dates for a meeting. (G. C. Ex. 6) Kase found this on his desk when he returned from vacation on June 29, along with the letter from nine employees to Turner requesting their cards back and a secret ballot election. (Resp. Ex. 1) (TR 292-294) He sent copies of these to Vetterlein. (TR 322-323)

On July 7, Kase wrote Alexander and told him that Vetterlein had been appointed to represent the Company, and to feel free to contact him and discuss the situation. (G. C. Ex. 7) Vetterlein was sent a carbon copy of that letter. (TR 323)

Thereafter, Vetterlein testified he had a telephone conversation with Alexander which he placed on July 12. One purpose of the telephone conversation was to set up a series of negotiating meetings for Value World in Sacramento and Modesto, an Employer

pany would not bargain. On June 14 the Company had a good faith doubt because the employees on June 9 and 10 had overwhelmingly indicated by secret ballot that they wanted an election rather than a card check, and Kase received these ballots on June 14, the same day that he received the Union's demand for recognition, and by July 12 this doubt had been fortified because the Company had received the letter from the employees to the Union asking for the return of their membership applications and that a secret ballot election be held. Whenever the refusal to bargain can be held to have occurred, the Company had a clear good faith doubt, and a genuine one, on that date.

(4) The Store Manager's Authority.

The Board argues vigorously in its brief (pages 15-16) that Finch as store manager had authority to recognize the Union, and since he signed the recognition agreement and the acknowledgment of the Union's majority status in the meeting on June 9 (G. C. Exs. 3 and 4), the Employer is bound by his acts. But this argument omits one important factual aspect of the situation, which was that the union organizers were told on June 9 by the Company's attorney that Finch did not have authority to sign any documents on behalf of the Company. There was conflicting evidence on this problem, as we have discussed above in Respondent's Counterstatement of the Case. Finch and Kessler, the Company's attorney, testified that they told the union organizers that Finch did not have authority to sign anything. Turner, the union or-

ganizer, testified that he was only told that Finch could not sign a collective bargaining agreement, but he could sign a recognition agreement. The Trial Examiner resolved this conflict of testimony in favor of the Employer. He found that Finch questioned whether he *could* or should sign the document handed him by Turner. (Trial Examiner's Decision, page 5, lines 12-14, R 17) He further found that Attorney Kessler told Turner in his telephone conversation that Finch was not to sign anything, that the matter was to be taken up by officials of the Company in San Francisco and that Finch had no authority to recognize the Union. (Trial Examiner's Decision, page 5, lines 34-36; page 8, lines 33-38, R 17 and 20) These factual findings were not reversed by the Board. It is true that the Board found as a legal conclusion that Finch had ostensible authority to acknowledge the Union's majority status (Board Decision, page 4, R 41) This legal conclusion was clearly at variance with the factual findings of the Trial Examiner which the Board failed to reverse or disavow to the effect that the Union had been specifically told that Finch did not have authority to recognize the Union. We therefore urge that the execution by Finch of the recognition agreement and the acknowledgment of the Union's majority status (G. C. Exs. 3 and 4) is not a significant or critical factor to the resolution of the real issues in this case, to wit, whether the cards were invalidated by the Union's misrepresentations to the employees and whether the Employer had a good faith doubt of the Union's majority status when it declined to recognize and bargain with the Union.

(5) Trend in Other Circuits.

All Circuits which have ruled on the issue follow the principles laid down by *Joy Silk Mills* and *Snow, supra,* that where a union has obtained authorization cards signed by a majority of employees in an appropriate unit, the employer, absent a good faith doubt as to the union's majority, violates the National Labor Relations Act if he refuses to recognize and bargain with the union. This is the governing principle. However, as shown above, it does not give the union an unqualified right to obtain recognition based upon authorization cards. It may not obtain such recognition if the cards are invalidated by reason of having been obtained through material misrepresentation or coercion. Furthermore, as the statement of the rule indicates, the union does not have a right to recognition on the basis of its membership application cards if the employer has a good faith doubt that the union represents a majority of the employees in the appropriate unit.

In the application of this rule there are of course a considerable number of cases in other Circuits, as in this Circuit, where an Employer has been found guilty of an illegal refusal to bargain when he declines to recognize a union on the basis of its card showing and cannot demonstrate a good faith doubt that the union represents a majority of the employees. But in addition, particularly in more recent cases, we denote a discernible trend of the Courts to be extremely cautious in finding that an employer lacks a good faith doubt as to the union's majority

status and a reluctance to order bargaining on the basis of an authorization card showing in the absence of clear or almost overwhelming evidence that the union was the majority representative, that the cards truly reflected the view of the employees, and that the employer lacked a good faith doubt as to the union's majority status. Such decisions have occurred in the Second, Fourth, Fifth, Sixth, Seventh and Eighth Circuits. *NLRB v. Flomatic Corporation* (2d Cir. 1965) 347 F. 2d 74, 59 LRRM 2535; *NLRB v. S. E. Nichols Company* (2d Cir. 1967) 380 F. 2d 438, 65 LRRM 2655; *NLRB v. River Togs, Inc.* (2d Cir. 1967) 382 F. 2d 198, 65 LRRM 2987; *Textile Workers Union of America v. NLRB (Hercules Packing Corporation)* (2d Cir. 1967) ..... F. 2d ....., 66 LRRM 2751; *NLRB v. Heck's, Inc.* (4th Cir. 1967) ..... F. 2d ....., 66 LRRM 2495; *Crawford Manufacturing Company, Inc. v. NLRB* (4th Cir. 1967) ..... F. 2d ....., 66 LRRM 2529; *NLRB v. Logan Packing Company* (4th Cir. 1967) ..... F. 2d ....., 66 LRRM 2596; *NLRB v. Great Atlantic & Pacific Tea Co.* (5th Cir. 1965) 346 F. 2d 936, 59 LRRM 2506; *Engineers & Fabricators, Inc. v. NLRB* (5th Cir. 1967) 376 F. 2d 482, 64 LRRM 2849; *Pizza Products Corporation v. NLRB* (6th Cir. 1966), 369 F. 2d 431, 63 LRRM 2529; *Peoples Service Drug Stores, Inc. v. NLRB* (6th Cir. 1967) 375 F. 2d 551, 64 LRRM 2823; *NLRB v. Swan Super Cleaners, Inc.* (6th Cir. 1967) 384 F. 2d 609, 66 LRRM 2385; *Phelps-Dodge Copper Products Corporation v. NLRB* (7th Cir. 1965) 354 F. 2d 591, 60 LRRM 2550;

NLRB v. Johnnie's Poultry Company (8th Cir. 1965) 344 F. 2d 617, 59 LRRM 2117; *NLRB v. Morris Novelty Co.* (8th Cir. 1967) 378 F. 2d 1000, 65 LRRM 2577; *Montgomery Ward & Co. v. NLRB* (8th Cir. 1967) ..... F. 2d ....., 66 LRRM 2689.

Some Circuits, namely, the Second, Fourth and Sixth, have stated that union authorization cards are generally or notoriously unreliable as an indicator of the union's majority status, and this is one of the reasons for their extreme caution in issuing bargaining orders based upon such cards. See: *NLRB v. River Togs, Inc.* (2d Cir. 1967) *supra; NLRB v. Logan Packing Company* (4th Cir. 1967) *supra; Pizza Products Corporation v. NLRB* (6th Cir. 1967) *supra; NLRB v. Flomatic Corporation* (2d Cir. 1965) *supra.* In *Logan Packing Company* the Court said:

> "It would be difficult to imagine a more unreliable method of ascertaining the real wishes of employees than a 'card check,' unless it were an employer's request for an open show of hands. The one is no more reliable than the other. No thoughtful person has attributed reliability to such card checks." ..... F. 2d ....., 66 LRRM 2596, 2598.

We do not suggest that this Circuit should forthwith overturn or reverse the principles it has established and enunciated ever since the decision in *Snow* in 1962. These principles have been upheld as recently as October 1967. *NLRB v. Luisi Truck Lines* (9th Cir. 1967) ..... F. 2d ....., 66 LRRM 2461; *NLRB v. Idaho Electric Co.* (9th Cir. 1967) 384 F. 2d

697, 66 LRRM 2393; *NLRB v. Mutual Industries, Inc.* (9th Cir. 1967) 382 F. 2d 988, 66 LRRM 2359. What we do urge is that when a case like the instant one arises where the Union has misrepresented to the employees the use which will be made of the authorization cards, where concurrently with the Union's demand for recognition, the employees have overwhelmingly requested that the recognition issue be determined by secret ballot rather than by card check, and where within a few days thereafter the employees have requested return of their cards from the Union, the Court should differentiate this type of situation from cases previously decided in this Circuit and should decline to issue a bargaining order based upon cards alone. Such a determination would be consistent with the reluctance shown by other Circuits to issue a bargaining order based on cards alone unless the proof is clear or almost overwhelming that the cards represent the true wishes of the employees and that the employer completely lacks any good faith doubt as to the union's majority status. Here the proof is to the opposite. Because of the Union's misrepresentations it is extremely dubious that the cards represented the true wishes of the employees, at least we cannot tell in the absence of an election, and certainly by reason of the ballots and the employees' June 14 letter the Employer had a good faith doubt as to the Union's majority status when it declined to bargain with the Union.

(6) Robinson's Speech of June 12 Does Not Dispel Respondent's Good Faith Doubt.

As we have shown above, Robinson's talk to the employees on June 12, 1965 was protected as free speech under Section 8(c) of the Act and did not unlawfully threaten the employees with a reduction in wages if a union contract were executed. Not only did the complaint fail to allege any such violation, but the Board's conclusion is not supported by its own factual analysis of Robinson's speech. The Trial Examiner was correct in finding that there was no violation of Section 8(a)(1) of the Act by Robinson's talk. The Board erroneously extracted an illegal implication from his remarks.

But even if Robinson's speech were held to be a violation of Section 8(a)(1) of the Act, it was at most a minor and isolated violation. Obviously, Robinson was merely trying to compare the Employer's existing wage schedule with the wage schedule existing under the Union's discount store agreement and if he transgressed across the line and predicted that the employees would have a reduction in the amount of money they received if they were under the Union contract, it was at the most an innocent and unintentional violation, more through a misuse of words than an attempt to threaten the employees with an actual loss. The Union contract was not as favorable to the employees as was Respondent's wage schedule and Robinson was just trying to point out that fact.

The Trial Examiner did not think that Robinson's speech was unlawful in any respect. The Court of

Appeals for the Second Circuit has suggested that the Board's disagreement with its own Trial Examiner compels a conclusion that a flagrant violation of the Act is not present.

> "The Board's disagreement with its own Trial Examiner of the purport and effect of Rice's letter certainly compels the conclusion that we are not presented with a flagrant violation of the Act." *NLRB v. Flomatic Corporation* (2d Cir. 1965) 347 F. 2d 74, 78, 59 LRRM 2535, 2538.

Robinson's speech, whether or not an unfair labor practice, certainly does not dispel Respondent's good faith doubt that the Union represented a majority of its employees, which doubt was created by the ballots and the employees' desires to have their cards returned by the Union. Whether or not an employer has a good faith doubt of a Union's majority status must be determined upon the totality of the situation, not solely because the Employer may have committed an independent unfair labor practice, if such is the case. There are a substantial number of cases in which the courts have declined to order Employers to bargain on the basis of a Union showing of membership applications, even though the Employer may have committed other independent unfair labor practices, some of them quite serious in nature. The existence of other unfair labor practices having been committed by the Employer does not, in and of itself, dissipate his good faith doubt concerning the Union's majority status with respect to his employees. See: *NLRB v. Hannaford Bros., Inc.* (1st Cir. 1959) 261 F.2d 638,

43 LRRM 23; *NLRB v. River Togs, Inc.* (2d Cir. 1967) 382 F.2d 198, 65 LRRM 2987; *NLRB v. Heck's Inc.* (4th Cir. 1967) ..... F.2d ....., 66 LRRM 2495; *Crawford Manufacturing Company v. NLRB* (4th Cir. 1967) ..... F.2d ....., 66 LRRM 2529; *NLRB v. Logan Packing Company* (4th Cir. 1967) ..... F.2d ....., 66 LRRM 2596; *NLRB v. Dan River Mills* (5th Cir. 1960) 274 F.2d 381, 45 LRRM 2389; *NLRB v. Great Atlantic & Pacific Tea Company* (5th Cir. 1965) 346 F.2d 936, 59 LRRM 2506; *Peoples Service Drug Stores, Inc. v. NLRB* (6th Cir. 1967) 375 F.2d 551, 64 LRRM 2823; *Montgomery Ward & Co., Inc. v. NLRB* (6th Cir. 1967) 377 F.2d 452, 65 LRRM 2285; *Reilly Tar & Chemical Corporation v. NLRB* (7th Cir. 1965) 352 F.2d 913, 60 LRRM 2437.

In *River Togs, Inc. (supra)* the Employer had engaged in various violations of Section 8(a)(1) of the Act, including threats to close the plant rather than join a union, telling employees that anyone who wanted a union could leave the plant, threatening employees with job loss if the union came in, and telling employees that union activity would cause a removal of machines and loss of work from the plant. Nevertheless, the Court held that the employer had good reason to doubt the union's majority status in view of the general unreliability of authorization cards and his belief that the cards had been obtained by misrepresentation by the union and because of an anti-union petition being circulated by employees in the plant and the doubtful validity of three signatures on various cards. The Court said:

> "But apart from that we see no logical basis for the view that substantial evidence of good faith doubt is negated solely by an employer's desire to thwart unionization by proper or even by improper means." 382 F.2d 198, 206-207, 65 LRRM 2587, 2993.

In *Montgomery Ward (supra),* the Sixth Circuit said:

> "An employer may have a good faith doubt as to the union's majority even though the employer was found guilty of an unfair labor practice in connection with the union's organizational campaign." 377 F.2d 452, 459, 65 LRRM 2285, 2290-2291.

It is not the existence of other unfair labor practices but rather the record as a whole which indicates whether or not an employer has a good faith doubt as to the union's majority status. In the instant proceeding the Employer clearly had a good faith doubt by reason of the ballots in which the employees asked for an election and by reason of their letter requesting their cards back from the Union.

CONCLUSION

It is respectfully submitted that upon the record in this case the Court should conclude:

(1) That Respondent did not violate Section 8(a)(1) of the Act by reason of Robinson's talk to the employees on June 12, 1965;

(2) That Respondent did not engage in an unlawful refusal to bargain in violation of Sections 8(a)(5) and 8(a)(1) of the Act;

(3) That Respondent has committed no unfair labor practices whatsoever; and

(4) That the Decision and Order of the National Labor Relations Board in this matter should be denied enforcement in its entirety.

Dated, San Francisco, California,
January 15, 1968.

Respectfully submitted,
LITTLER, MENDELSON & FASTIFF,
By ARTHUR MENDELSON,
Attorneys for Respondent.

CERTIFICATE OF ATTORNEY

I certify that in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those Rules.

ARTHUR MENDELSON

(Appendices "A" and "B" Follow)

Appendices A and B

Appendix "A"

TABULATION OF EMPLOYEES IN UNIT JUNE 9, 1965, EMPLOYEES SIGNING CARDS, EMPLOYEES SIGNING LETTER OF JUNE 14, 1965 REQUESTING RETURN OF CARDS, AND EMPLOYEES STILL EMPLOYED AND TESTIFYING AT TIME OF HEARING.

Employees in Unit June 9, 1965	Signed Card	Signed Letter Asking Return of Cards	Still Employed and Testified at Hearing
Jean Modrell	yes (GC 8)	no	yes
Forrest Baekert	yes (GC 15)	no	no
Jayne Casler	yes (GC 10)	yes	yes
Margaret Huckaby	yes (GC 18)	yes	yes
Ethel Lang	yes (GC 11)	yes	no
David Tingle	yes (GC 14)	yes	no
Richard Cieri	yes (GC 17)	yes	yes
Janet Canfield	yes (GC 13)	yes	yes
Billy Canfield	no	yes	yes
J. Pape	no	yes	no
Ron Nickol	no	yes	no
Employees No Longer in Unit June 9, 1965			
Michael Stone	yes (GC 16)		
Diane Labriola	yes (GC 12)		
Tom Modrell	yes (GC 9)		

Appendix "B"

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C., Secs. 151 *et seq.*) and of the Rules and Regulations of the National Labor Relations Board, Series 8, ... CFR ....., *et seq.*, are as follows:

Unfair Labor Practices

Sec. 8. (a) It shall be an unfair labor practice for an employer—

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7; * * *

* * * *

(5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 9(a).

* * * *

Free Speech

Sec. 8. (c) The expressing of any views, argument, or opinion, or the dissemination thereof, whether in written, printed, graphic or visual form, shall not constitute or be evidence of an unfair labor practice under any of the provisions of this Act, if such expression contains no threat of reprisal or force or promise of benefit.

Prevention of Unfair Labor Practices

Sec. 10

* * * * *

(c) The Board shall have power to petition any court of appeals of the United States, or if all the

courts of appeals to which application may be made are in vacation, any district court of the United States, within any circuit or district, respectively, wherein the unfair labor practice in question occurred or wherein such person resides or transacts business, for the enforcement of such order and for appropriate temporary relief or restraining order, and shall file in the court the record in the proceedings, as provided in section 2112 of title 28, United States Code. Upon the filing of such petition, the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction of the proceeding and of the question determined therein, and shall have power to grant such temporary relief or restraining order as it deems just and proper, and to make and enter a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board. No objection that has not been urged before the Board, its member, agent, or agency, shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances. The findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive. If either party shall apply to the court for leave to adduce additional evidence and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for the failure to adduce such evidence in the hearing before the Board, its member, agent, or agency, the court may order such additional evidence to be taken before the Board, its member, agent, or

agency, and to be made a part of the record. The Board may modify its findings as to the facts, or make new findings by reason of additional evidence so taken and filed, and it shall file such modified or new findings, which findings with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive, and shall file its recommendations, if any, for the modification or setting aside of its original order. Upon the filing of the record with it the jurisdiction of the court shall be exclusive and its judgment and decree shall be final, except that the same shall be subject to review by the appropriate United States court of appeals if application was made to the district court as hereinabove provided, and by the Supreme Court of the United States upon writ of certiorari or certification as provided in section 1254 of title 28.

* * * * *

Rules and Regulations of the National Labor Relations Board (29 CFR Part 102, Sec. 102.17):

Sec. 102.17 *Amendment.*—Any such complaint may be amended upon such terms as may be deemed just, prior to the hearing, by the regional director issuing the complaint; at the hearing and until the case has been transferred to the Board pursuant to section 102.45, upon motion, by the trial examiner designated to conduct the hearing; and after the case has been transferred to the Board pursuant to section 102.45, at any time prior to the issuance of an order based thereon, upon motion, by the Board.

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

No. 21910

VICTOR LANGSTON LANGHORNE,
Appellant,

vs.

UNITED STATES OF AMERICA,
Appellee.

APPELLANT'S OPENING BRIEF

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IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

No. 21910

VICTOR LANGSTON LANGHORNE,
Appellant,

vs.

UNITED STATES OF AMERICA,
Appellee.

APPELLANT'S OPENING BRIEF

JURISDICTION

This is an appeal from a judgment rendered by the United States District Court for the Central District of California.

The appellant was sentenced to the custody of the Attorney General for a period of three years after a one count conviction for violation of Title 50, United States Code App., Section 462 (knowingly fail and refuse to perform civilian work, as ordered), Universal Military Training and Service Act [Tr. 30].[1]

---

1. Tr—refers to Transcript of Record.

Title 18, United States Code, Section 3231, conferred jurisdiction in the District Court over the prosecution of this case. The United States Court of Appeals for the Ninth Circuit has jurisdiction of this appeal under Rule 37 (A) (1) and (2) of the Federal Rules of Criminal Procedure. Notice of Appeal was filed in the time and manner required by law [Tr. 32].

STATEMENT OF THE CASE

The indictment charged appellant with a violation of the Universal Military Training and Service Act for refusing to submit to induction [Tr. 2].

Appellant pleaded "not guilty" and was tried by the Honorable Jesse W. Curtis, District Judge, sitting alone without a jury. Appellant was found guilty and sentenced to imprisonment for a period of three years [Tr. 30].

A written motion for judgment of acquittal was filed during the trial [Tr. 22].

THE FACTS

On April 2, 1962, appellant filed his Classification Questionnaire (SSS Form No. 100) and signed series VIII [Ex. 7][2] indicating he was a conscientious objector.

He was mailed the Special Form for Conscientious Objector (SSS Form No. 150) and timely returned it, fully executed [Ex. 15-18]. In this form he showed he believed

---

2. Ex. refers to the government's exhibit, the complete Selective Service System file of the appellant.

in a Supreme Being and showed that his religious beliefs took precedence over any earthly command [Ex. 15-18].

He presented evidence showing he was a minister, in said conscientious objector form [Ex. 22-25].

Nevertheless, despite anything in the file to the contrary, or in existence, he was classified in Class I-O. He asked for an Appearance and again claimed he was a minister [Ex. 26].

The local board and his appeal board rejected his minister claim but the appeal board reclassified him as a conscientious objector.

He was ordered to do civilian work but refused.

QUESTIONS PRESENTED

I

Was the denial of the minister's claim without basis in fact?

This question was raised by the Motion for Judgment of Acquittal [Tr. 22].

II

Was the work to which he was ordered appropriate? This question was raised by the motion [Tr. 22].

SPECIFICATION OF ERROR

I

The District Court erred in denying the Motion for Judgment of Acquittal.

SUMMARY OF ARGUMENT

I

Appellant made out a prima facie case as a minister. The task of the court is to search the record for some affirmative evidence to support the local board's denial of IV-D classification to appellant. The record in this case is barren of any such evidence.

Dickinson v. *United States,* 74 S. Ct. 152 (1953).

II

The work to which appellant was ordered was inappropriate in that it involved elements contrary to his religion.

Dickinson, supra.

32 C.F.R., § 1627.43.

ARGUMENT

I

The Draft Board Violated Defendant's Rights under the Act and the Regulations to Have His Claim for a Minister's Classification Considered Because It Completely By-Passed and Skipped Consideration of His Evidence.

The evidence shows appellant presented a *prima facie* case for a IV-D classification (minister's status). No contrary evidence, if any existed, was ever placed in the file. Therefore, he should have been classified in Class IV-D. It was incumbent on the board to place adverse evidence in the file, as a justification for rejecting his claim. *Dickinson* v. *United States,* 74 S. Ct. 152.

The applicable regulation of the Selective Service System, 32 C.F.R., Sec. 1623.2, requires that a registrant be classified in the "lowest" class, according to a table which places IV-D "lower" than I-O.

> 1623.2 Consideration of Classes.—Every registrant shall be placed on Class I-A under the provisions of section 1622.10 of this chapter except that when grounds are established to place a registrant in one or more of the classes listed in the following table, the registrant shall be classified in the lowest class for which he is determined to be eligible, with Class I-A-O considered the highest class and Class I-C considered the lowest class according to the following tables:

Class:		Class:	
	I-A-O		IV-B
	I-O		IV-C
	I-S		IV-D
	I-Y		IV-F
	II-A		IV-A
	II-C		V-A
	II-S		I-W
	I-D		I-C
	III-A		

The regulation governing classification of registrants presenting evidence for a minister's status is 32 C.F.R. § 1622.43.

> 1622.43 Class IV-D: Minister of Religion or Divinity Student.—(a) In Class IV-D shall be placed any registrant:
>
> (1) Who is a regular minister of religion;
>
> (2) Who is a duly ordained minister of religion;

(3) Who is a student preparing for the ministry under the direction of a recognized church or religious organization and who is satisfactorily pursuing a full-time course of instruction in a recognized theological or divinity school; or

(4) Who is a student preparing for the ministry under the direction of a recognized church or religious organization and who is satisfactorily pursuing a full-time course of instruction leading to entrance into a recognized theological or divinity school in which he has been pre-enrolled.

(b) Section 16 of Title I of the Universal Military Training and Service Act, as amended, contains in part the following provisions:

"Sec. 16. When used in this title— * * * (g) (1) the term 'duly ordained minister of religion' means a person who has been ordained, in accordance with the ceremonial, ritual, or discipline of a church, religious sect, or organization established on the basis of a community of faith and belief, doctrines and practices of a religious character, to preach and to teach the doctrines of such church, sect, or organization and to administer the rites and ceremonies thereof in public worship, and who as his regular and customary vocation preaches and teaches the principles of religion and administers the ordinances of public worship as embodied in the creed or principles of such church, sect, or organization.

"(2) The term 'regular minister of religion' means one who as his customary vocation preaches and teaches the principles of religion of a church, a religious sect, or organization of which he is a member, without having been formally ordained as a minister

of religion, and who is recognized by such church, sect, or organization as a regular minister.

"(3) The term 'regular or duly ordained minister of religion' does not include a person who irregularly or incidentally preaches and teaches the principles of religion of a church, religious sect, or organization and does not include any person who may have been duly ordained a minister in accordance with the ceremonial, rite, or discipline of a church, religious sect or organization, but who does not regularly, as a vocation, teach and preach the principles of religion and administer the ordinances of public worship as embodied in the creed or principles of his church, sect, or organization."

It is thus evident that "vocation" is the chief consideration. "Full-time" is nowhere mentioned; nor is "part-time" mentioned. Nor is the word "Pioneer" or any equivalent expression used. Neither hours of activity nor clerical title are recognized by the Act or the regulations as factors in classifying.

II

The Work to Which Appellant Was Ordered Was Inappropriate in That It Involved Elements Contrary to His Religion.

Appellant was ordered to do his civilian work at the Los Angeles County Department of Charities [Ex. 79]. Before being so ordered the State Director had asked the Director for such authority, stating that the work was "suitable." [Ex. 76]. The Director approved [Ex. 75].

We do not contend that this work did not meet all the statutory requirements, in general.

We contend that it was not suitable, in particular, that is, as an assignment to this appellant.

The law provides that work assigned shall be "appropriate." [32 C.F.R. § 1660.1]. Where the registrant does not agree to the type suggested to him by the Selective Service System an arbitration-type of meeting is arranged [32 C.F.R. § 1660.20 (c)].

Our first complaint is that the work chosen by the local board, and without the consent of the registrant, was in his own community, a violation of Section 1660.21(a), in that the local board did not make the specific finding required. See Exhibit 73. The section involved reads as follows:

> 1660.21 General Provisions Relating to Orders by the Local Board to Perform Civilian Work and Performance of Civilian Work.—(a) No registrant shall be ordered by the local board to perform civilian work in lieu of induction in the community in which he resides unless in a particular case the local board deems the performance by the registrant of such work in the registrant's home community to be desirable in the national interest.

Our next objection is that the work chosen did not fit his special abilities. He pointed out, in the form sent him by the local board to so state, that his special training was in the field of mechanic's work, on cars [Ex. 60]. Although such work was available [Ex. 63] it was not selected by the board.

Our final objection is that the work ordered involved duties contrary to his religious beliefs. His unrebutted

testimony showed that the work interfered with his religious (ministry) commitment because of the hours [Rep. Tr. p. 8, lines 5-]. On cross-examination he spelled out the religious work he did: "I have five meetings a week that I attend, besides going in the field service. These five meetings are on Tuesday, Thursday, and Sunday, and they are from 8:00 until 9:00 on Thursday, and from 6:30 until approximately 8:45 on Sunday, and, see, this would be interfering with this because I would be on call all the time. One week I would have to miss all my meetings until they rearranged it, until I worked on the day shift." [Rep. Tr. 9, line 19].

He also showed that the work offered would involve handling blood, contrary to his religious belief and the well-known beliefs of the Jehovah's witnesses [Rep. Tr. 8/21].

Work religiously objectionable has been held inappropriate for the alternate service contemplated by Congress.

In *United States* v. *Copeland,* D. Conn. 1954, 126 F. Supp. 734, it was held that work that adversely affected the religious beliefs of a registrant was inappppropriate.

Likewise, in *United States of America, Plaintiff* v. *George Donald Sparks, Defendant,* Criminal No. IP-54-CR-30 decided by Honorable William E. Steckler, district judge, Southern District of Indiana, Indianapolis Division on February 11, 1955, the court held that the work to which Sparks had been ordered "clashed with those of the sectarian principles of the defendant" and therefore acquitted him.

CONCLUSION

For the reasons stated above, it is respectfully submitted that the judgment of the District Court should be reversed and the cause remanded with instructions to grant the petition for writ of habeas corpus.

Respectfully submitted,

J. B. TIETZ and
MICHAEL HANNON
Attorneys for Appellant

I certify that, in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

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OCTOBER 20, 1967

NO. 21910

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

VICTOR LANGSTON LANGHORN,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLEE'S BRIEF

APPEAL FROM
THE UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA

WM. MATTHEW BYRNE, JR.,
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NO. 21910

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IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

VICTOR LANGSTON LANGHORN,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLEE'S BRIEF

I

JURISDICTIONAL STATEMENT

The appellant, Victor Langston Langhorn, was indicted on December 14, 1966 [C. T. 2]. 1/ The indictment was brought under 50 U. S. C., App. Section 462, and charged that the appellant failed and refused to perform a civilian work assignment as ordered. The case proceeded to trial before the Honorable Jesse W. Curtis, United States District Judge. The appellant was found guilty and sentenced to the custody of the Attorney General for a period of three years [C. T. 30].

1/ "C. T." refers to Clerk's Transcript of the proceedings.

Appellant's Notice of Appeal was timely filed on April 4, 1967 [C. T. 32].

The jurisdiction of the District Court was based upon Title 50, United States Code, App., Section 462, Title 18, United States Code, Section 3231, and Rule 18 of the Federal Rules of Criminal Procedure. This Court has jurisdiction to review the judgment of the District Court pursuant to Title 28, United States Code, Sections 1291 and 1294, and Rule 37(a) of the Federal Rules of Criminal Procedure.

II

STATUTE INVOLVED

Title 50, United States Code, App., Section 462, provides in pertinent part as follows:

> "Any member of the Selective Service System or any other person charged as herein provided with the duty of carrying out any of the provisions of this title . . . or the rules or regulations made or directions given thereunder, who shall knowingly fail or neglect to perform such duty . . . or who otherwise evades or refuses . . . service in the armed forces or any of the requirements of this title . . . or who in any manner shall knowingly fail or neglect or refuse to perform any duty required of him under or in the execution of this title . . . or rules,

regulations or directions made pursuant to this title . . . shall, upon conviction in any district court of the United States of competent jurisdiction, be punished by imprisonment for not more than five years or a fine of not more than $10,000, or both. . . ."

III

QUESTIONS PRESENTED

1. Was there a basis in fact for appellant's I-O classification?

2. Was appellant's civilian work assignment appropriate?

IV

STATEMENT OF FACTS

The appellant first registered with the Selective Service System on July 5, 1960 [Ex. p. 1]. 2/ On May 1, 1962, the appellant was classified I-A. The appellant appealed from this I-A classification on May 11, 1962 [Ex. p. 19].

On May 17, 1965, the Department of Justice tentatively determined that the registrant should be classified in Class I-O [Ex. p. 32]. On July 22, 1965, the appellant was classified I-O by his appeal board [Ex. p. 45].

2/ Refers to appellant's Selective Service filed admitted in evidence.

On September 2, 1965, appellant requested a change in his classification from Class I-O to that of 4-D [Ex. p. 50]. On October 4, 1965, the appellant was mailed a special report for Class I-O registrants [Ex. p. 58], and on October 26, 1965, the appellant was requested to select the type of civilian work assignment which he would be desirous of performing [Ex. p. 64]. The appellant responded that he would refuse to accept any civilian work assignment proffered [Ex. p. 64].

The District Coordinator arranged a meeting between the Local Board and the registrant on April 12, 1966, to see if an appropriate work assignment could be found for appellant [Ex. p. 69]. On April 12, 1966, the appellant met with his Local Board and Captain Proffitt, the District Coordinator. At this meeting it was determined that appellant worked 8 hours per day as a gas station attendant and that appellant was not a full time minister for the Jehovah's Witnesses and not a Regular Pioneer [Ex. p. 71]. Appellant signed a statement of refusal to accept a civilian work assignment [Ex. p. 72]. At this time it was determined that work as an institutional helper at the Los Angeles County Department of Charities would be an appropriate civilian work assignment for the appellant.

On May 11, 1966, appellant's civilian work assignment was approved [Ex. p. 75], and on July 19, 1966, appellant was ordered to report for a civilian work assignment at the New General Hospital in Los Angeles. Appellant was ordered to report not later than July 20, 1966 [Ex. p. 79]. On July 19, 1966, appellant reported to the Los Angeles County Department of Charities and

refused to accept a civilian work assignment.

V

ARGUMENT

A. THE BOARD DID NOT ACT ARBITRARILY AND CAPRICIOUSLY IN DENYING APPELLANT'S REQUEST FOR A MINISTERIAL EXEMPTION.

Appellant argues that he "presented a prima facie case" for a ministerial classification and that no contrary evidence was ever placed before the Board. A careful reading of appellant's file, however, discloses that no such prima facie showing was ever made. Furthermore, there is an abundant amount of evidence to the contrary.

On June 10, 1962, appellant first applied for a ministerial classification after he had been previously classified I-A. However, nowhere did appellant allege that he was a Pioneer minister, the leader of his congregation or that he worked at least 100 hours per month preaching his faith. In fact, appellant's request for ministerial classification was phrased in the alternative, as follows: "Being a minister, I feel that I am entitled to a minister's classification as provided for by the Selective Service Act. Failing that, I feel that I am entitled to consideration as a conscientious objector to both combatant and non-combatant service." [Ex. p. 22]

In short, the only showing made by appellant at that time as

to his qualifications for the ministerial classification was that "All those associated with the Watchtower Society are ministers and are to preach the Kingdom to the people." [Ex. p. 25]

Clearly the showing made by appellant was inadequate to establish him as being within that class of people entitled to the ministerial classification. An exemption or deferment is not a matter of right but is a privilege, and the burden is upon the registrant to establish his eligibility for exemption or deferment to the satisfaction of the local board. Lingo v. United States, No. 21630 (Oct. 26, 1967, 9th Circuit) (slip sheet opinion).

Appellant was subsequently classified I-O and ordered to report for a civilian work assignment. On April 12, 1966, appellant met with his Local Board and Captain Proffitt, the representative of the State Director, to see if an appropriate civilian work assignment could be selected. Appellant again affirmed that he would refuse to accept a work assignment. During the meeting it was again determined that appellant was working eight hours per day as a gas station attendant, that he was not a full time minister and not a regular Pioneer [Ex. p. 71].

Congress has made it clear that to be within the class of people eligible for the ministerial classification a member of the Jehovah's Witness faith must be more than a general member of the faith, he must be a leader of his congregation, analogous to the leaders of other faiths.

Congress took care to explain their intent in passing the ministerial classification. Senate Report No. 1268, 80th Congress,

Second Session, dated May 12, 1948, starting on page 13 provides in pertinent part:

> " . . . Serious difficulties arose in the administration and enforcement of the 1940 Act because of the claims of members of one particular Faith that all of its members were ministers of religion. A minority of the Supreme Court thought that Congress intended to grant an exemption broad enough to include this group. In order that there be no misunderstanding of the fact that the exemption granted is a narrow one, intended for the leaders of the various religious faiths and not for the members generally, the term 'regular or duly ordained ministers of religion' have been defined in Section 16(g). "

The appellant is a Jehovah's Witness. The courts on many occasions have had occasions to review the organizational structure of the church of Jehovah's Witnesses. The best discussion may be found in United States v. Tettenburn, 186 F. Supp. 203 (1960). The case points out that from the moment a man is baptized into the faith he is considered by all members to be a duly ordained minister. But this does not mean he is the leader of the local church. The leader in each congregation is the Congregation Servant. The members in general may have other titles, such as assistant minister, bible study servant, magazine servant, but the leader is the Congregation Servant. He is the one to whom the remainder of the

congregation looks to for guidance. It is clear that appellant never achieved the status of a leader of his congregation.

B. THE CIVILIAN WORK ASSIGNMENT SELECTED FOR APPELLANT WAS APPROPRIATE.

Appellant contends that the civilian work assignment selected for him was not suitable in that it did not fit his special abilities and further that the work was in his home community.

Appellant is clearly incorrect in suggesting that the word "appropriate" found in 32 C. F. R. §1660.1 establishes that certain types of individuals conscientiously opposed to war must be given civilian work assignments which most closely correspond to their talents and training. Section 1660.1 merely defines the types of civilian work which are appropriate under the act. Nowhere in §1660.1 does it state that individuals with special skills must be assigned a similar type of work for a civilian work assignment.

Furthermore, in each instance that appellant was given an opportunity to submit the type of work which he might prefer as a civilian work assignment he refused to do so stating that he would refuse to select any type of work proffered [Ex. pp. 26, 50, 59, 65, 71, 72].

Appellant stated, in court, that the work offered him would have involved the handling of blood which was contrary to his religious beliefs. This argument might well have been made upon the occasion of his meeting with his local board to select an

appropriate work assignment. To first refuse any work at all and then to come into court and testify that the work assignment was inappropriate because it is violative of his religious beliefs is an untenable argument at best. Appellant made no showing at the appropriate time that he was opposed to work in a hospital and it can only be concluded, as he himself stated on numerous occasions, that he would not have accepted any civilian work assignment, regardless of what type of work it might have entailed.

Finally, appellant's rights were in no way violated nor was any procedural error committed when the appellant was assigned a civilian work assignment in his home community. Section 1660.21 merely states that no registrant will be assigned a civilian work assignment in the community in which he resides unless the local board deems such work is the registrant's home community to be desirable. Appellant's local board notified him that work as an institutional helper at the Los Angeles County Department of Charities was "appropriate". That is all that the regulation requires.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the judgment of conviction of appellant Victor Landston Langhorn should be affirmed.

Respectfully submitted,

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Assistant U. S. Attorney,
Chief, Criminal Division,

ANTHONY MICHAEL GLASSMAN,
Assistant U. S. Attorney,

Attorneys for Appellee,
United States of America.

CERTIFICATE

I certify that, in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

/s/ Anthony Michael Glassman
ANTHONY MICHAEL GLASSMAN

NO. 21,911

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

LIBATI LUI UNGA,

Petitioner,

v.

IMMIGRATION AND NATURALIZATION SERVICE,

Respondent.

RESPONDENT'S BRIEF

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LIHATI LUI UNGA,

Petitioner,

v.

IMMIGRATION AND NATURALIZATION SERVICE,

Respondent.

RESPONDENT'S BRIEF

JURISDICTION

The petition to review final order of deportation is clearly within the jurisdiction of the Court under 8 USC 1105a (Section 106 of the Act).

STATEMENT OF CASE

Petitioner is a native and citizen of Tonga, 44 years of age. He entered the United States at Honolulu, State of Hawaii, March 26, 1963, as a student authorized to remain until March 25, 1964.

On January 15, 1964 he was granted the privilege of voluntary departure on or before February 14, 1964, because he was not attending a Service-approved school and was employed without permission. He made application for status as a permanent resident under Section 245 (8 USC 1255). This was denied and he was given to May 22, 1965 within which to depart. He did not depart. His deportability is conceded.

The Section 245 application was denied in the exercise of discretion. Petitioner appealed and the Board of Immigration Appeals remanded for further consideration in the light of a new regulation (8 CFR 212.8(b)(4)). On further hearing the Special Inquiry Officer again denied the application. Petitioner again appealed, and the Board of Immigration Appeals dismissed the appeal on the ground that the application did not warrant a favorable exercise of discretion. A copy of the Board of Immigration Appeals decision is attached as Attachment I.

QUESTION

Has there been an abuse of discretion?

ARGUMENT

The only thing open for review is the final order of deportation. The Board has exercised its discretion. The failure to determine the question of eligibility is not prejudicial to petitioner.

Silva v. Carter (9 Cir.)
326 F.2d 315,
Cert. den. 377 US 917

Santos and Murillos v. INS (9 Cir.)
375 F.2d 262

Hintopoulos v. Shaughnessy
353 US 72

Jay v. Boyd
351 US 345

Garcia-Castillo v. INS (9 Cir.)
350 F.2d 1

CONCLUSION

The Board of Immigration Appeals having denied the §245 application in the exercise of discretion, review of the decision of the Board of Immigration Appeals and the record fails to disclose

any abuse.

It is respectfully submitted that the petition should be dismissed.

CECIL F. POOLE
United States Attorney

By: _____
CHARLES ELMER COLLETT
Chief Assistant United States Attorney

Attorneys for Respondent

DATED:
November 24, 1967.

CERTIFICATE

I certify that, in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

CHARLES ELMER COLLETT
Chief Assistant United States Attorney

= =

CERTIFICATE OF SERVICE BY MAIL

I hereby certify that a copy of the foregoing Respondent's Brief was served upon petitioner by depositing the same in the United States mail at 450 Golden Gate Avenue, San Francisco, California, addressed to Attorneys for Petitioner,

MILTON T. SIMMONS, Esq.
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517 Washington Street
San Francisco, California 94111

DATED:

November 27, 1967

CHARLES ELMER COLLETT
Chief Assistant United States Attorney

UNITED STATES DEPARTMENT OF JUSTICE
Board of Immigration Appeals

MAY 11 1967

File: A-13550817 - San Francisco

In re: LIHATE LUI UNGA

IN DEPORTATION PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT: Donald L. Ungar, Esq.
Phelan, Simmons & Ungar
1210 Mills Tower
San Francisco, Calif. 94104
(Brief filed)

ON BEHALF OF I&N SERVICE: Stephen M. Suffin, Esq.
Trial Attorney
(Brief filed)

CHARGES:

Order: Section 241(a)(2), I&N Act (8 USC 1251 (a)(2)) - Nonimmigrant, remained longer

Lodged: None

APPLICATION: Status as a permanent resident - Section 245, Immigration and Nationality Act; otherwise, voluntary departure

The case comes forward on appeal from the order of the special inquiry officer dated November 22, 1966 denying the respondent's application for status as a permanent resident under Section 245 of the Immigration and Nationality Act, granting voluntary departure in

ATTACHMENT I

lieu of deportation with the further order that if the respondent failed to depart when and as required, he be deported to Tonga on the charge contained in the Order to Show Cause.

The respondent is a native and citizen of Tonga, 44 years old, married, male. His only entry into the United States occurred at the port of Honolulu, Hawaii on March 26, 1963 as a student, authorized to remain here until March 25, 1964. On January 15, 1964, he was granted the privilege of voluntary departure on or before February 14, 1964 because he was not attending a Service-approved school and was employed without permission. On April 22, 1965, his application for status as a permanent resident under Section 245 of the Immigration and Nationality Act was denied and he was given until May 22, 1965 within which to depart from the United States voluntarily. The respondent did not leave and is accordingly deportable on the charge stated in the Order to Show Cause. Deportability is conceded.

In his previous order of March 16, 1966, the special inquiry officer held that an alien, such as the respondent, coming to the United States to operate his own business, which involved only the purchase of old merchandise, such as clothing, household utensils or sewing machines, and shipping them to a foreign country for resale, was not coming to perform skilled or unskilled labor within the meaning of Section 212(a)(14) of the Immigration and Nationality Act and did not need a certification from the Secretary of Labor. However, the special inquiry officer denied the application for permanent resident status under Section 245 of the Immigration and Nationality Act in the exercise of discretion but granted the privilege of voluntary departure. When the case was last before this Board on September 14, 1964, in view of the promulgation of new regulations, which included among aliens not required to obtain a labor certification, those who were to engage in a com-

mercial or agricultural enterprise in which the alien had invested or was actively in the process of investing a substantial amount of capital, 8 CFR 212.8(b)(4), the case was remanded for consideration in light of the new regulation, for additional evidence to establish eligibility for exemption of the labor certification prescribed in Section 212(a)(14) of the Act and for further evidence to determine whether relief was justified as a matter of discretion.

At the reopened hearing, it was developed that the respondent had ceased performing labor (employment as a gas station attendant) and has been engaged in buying and exporting to Tonga used clothing and other items for sale there by his brother. Since February 1966 he has made five shipments at a total cost of $2,553, consisting of $1,974, the cost of the merchandise shipped, $575 for freight and $13 for miscellaneous expenses. Gross proceeds from the first two shipments were $2,228. The respondent estimates a net profit from the five shipments of $1,636. He plans to make larger and more frequent shipments, and expects to do so despite competition from others who have been buying old merchandise for shipment to Tonga, and despite Tonga's limited population of about 60,000. The respondent has $900 in his business account, and there is being held in trust for him by his counsel $1,200 which he borrowed from a bank in San Francisco for the purpose of bringing his wife and seven alien minor children to the United States if he is granted permanent resident status. Applying the new regulation, 8 CFR 212.8(b)(4), the special inquiry officer found that the respondent was not exempt from the labor certification requirement of Section 212(a)(14).

We do not find it necessary to reach the question of a labor certification.1/ The grant of adjustment of status pursuant to Section 245 of the Immigration and

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1/ Matter of Leger, Int. Dec. 1638.

Nationality Act is, by its very terms, discretionary. The Board has the authority to review eligibility for discretionary relief on appeal.2/

The respondent has no close family ties or dependents living in the United States. His wife and seven children are citizens and residents of Tonga. The respondent entered the United States as a student in March 1963. Within six months his attendance at school became very sporadic and thereafter he attended school very little, if at all. On January 15, 1964, he was granted the privilege of departing voluntarily because he was not attending a Service-approved school and was employed without permission. From the evidence of the respondent's meager assets and small potential income, it is extremely doubtful that he would be able to support his wife and seven children in the United States from the profits he makes from his business enterprise. The fact that he may encounter greater difficulty in obtaining an immigrant visa abroad than in obtaining permanent resident status under Section 245 while in the United States is not sufficient reason for exercising discretion in his favor. Under the circumstances, and in the absence of outstanding equities in respondent's favor, the grant of the discretionary relief of permanent resident status pursuant to Section 245 of the Immigration and Nationality Act is not justified.

Counsel has raised in this case, as he has in other cases, the effect of the amendment to Section 245(c) of the Immigration and Nationality Act by the Act of November 2, 1966 (P. L. 89-732, 80 Stat. 1161). We

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2/ Tovar v. Immigration and Naturalization Service, 368 F.2d 1006 (9th Cir. 1966).

have already concluded that the amendment to Section 245(c) created an exception only for those mentioned in Section 245(c), namely, natives of the Western Hemisphere and adjacent islands who had filed applications for adjustment of status before December 1, 1965. It was not meant for others.3/ The appeal will be dismissed.

ORDER: It is ordered that the appeal be and the same is hereby dismissed.

Chairman

3/ Matter of Hoeft, Int. Dec.1723 (April 14, 1967).

NO. 21,912

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

ALI ASGHAR ASGHARI,

Petitioner,

v.

IMMIGRATION AND NATURALIZATION SERVICE,

Respondent.

BRIEF FOR RESPONDENT

CECIL F. POOLE
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Attorneys for Respondent

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NO. 21,912

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

ALI ASGHAR ASGHARI,

Petitioner,

v.

IMMIGRATION AND NATURALIZATION SERVICE,

Respondent.

BRIEF FOR RESPONDENT

JURISDICTION

Deportability on the charges in the Order to Show Cause is conceded. (Petitioner's Brief, p. 2.) He seeks review of denial of discretionary relief sought through §243(h) of the Act (8 USC 1253(h)). This Court has jurisdiction by §106 of the Act (8 USC 1105a).

Foti v. INS
375 US 217

STATEMENT OF THE CASE

Petitioner's statement is correct.

Respondent adds the following:

Petitioner was admitted as a temporary visitor on December 10, 1960. Upon application his status was changed to that of a student and he was granted extension to March 15, 1965. He remained thereafter (R., p. 30). When he obtained the visitor's visa from the American Consul in Iran, he knew he would not be able to get a student's visa. He told the Consul he was coming as a visitor for three to six months, although he intended to stay six years (R., p. 31). After receiving the extension to March 15, 1965 on his student status, he was given a further extension to April 6, 1965 to depart. Instead of departing, he went to New York without informing the respondent of his change of address and without leaving a forwarding address with his landlady. He was apprehended June 16, 1966 (R., p. 3). His §243(h) claim

of persecution is founded on fear caused only by his activities since coming to the United States, by joining the Iranian Student Association (R., p. 3.)

It is also to be noted that about four or five months after respondent arrived, he obtained employment, without first getting permission to do so from respondent. On February 17, 1964 and on February 15, 1965, when he applied for extension of status, he falsely stated he had not been employed and that his means of support was money from his uncle (R., p. 31.)

STATUTE

Section 243(h) (8 USC 1253(h)) is quoted in petitioner's brief.

THE ISSUE

Was petitioner accorded a fair hearing and due process on his application for discretionary relief.

ARGUMENT

The record fully supports the decision of the Special Inquiry Officer (R., pp 30-34) and the

order of the Board of Immigration Appeals dismissing the appeal (R., pp 1-5). Petitioner was accorded a full and fair opportunity to present whatever evidence he had to support his claim to persecution. There has been no abuse of discretion. The most recent case in this Circuit has been cited by petitioner, Schieber v. INS, 347 F.2d 357. There, as here, respondent submits the record amply supports the refusal of the Attorney General to withhold deportation.

Petitioner in his brief (p. 6) says his burden is heavy: "It is not easy for an individual in the United States to procure evidence of persecution in a foreign country.", to which might be added -- having come as a visitor for a short stay; having succeeded in changing his status to that of a student; having obtained extensions by concealing the fact that he had obtained employment without permission; then moving to New York without giving a change of address, so that it was a year before he was apprehended, and finally, entering into an association

and pursuing a course of conduct in this country which he thought might make him persona non grata at home --

It is respectfully submitted that the decision of the Special Inquiry Officer and the Board of Immigration Appeals should be sustained.

Respectfully submitted,

CECIL F. POOLE
United States Attorney

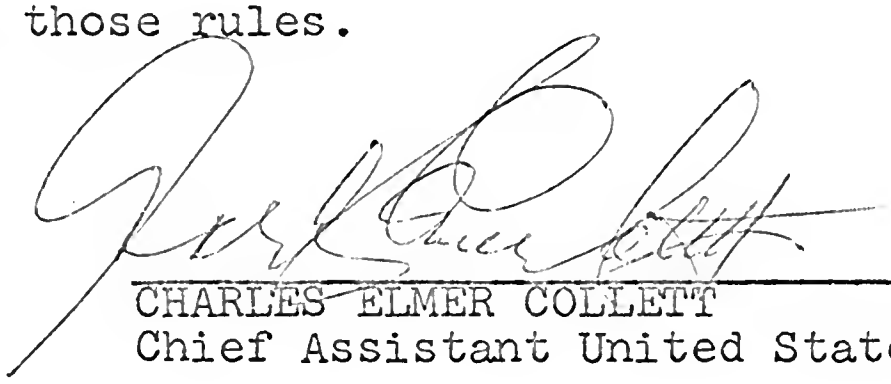
By: _____
CHARLES ELMER COLLETT
Chief Assistant United States Attorney

Attorneys for Respondent

DATED: November 9, 1967.

CERTIFICATE

I certify that, in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.



CHARLES ELMER COLLETT
Chief Assistant United States Attorney

CERTIFICATE OF SERVICE BY MAIL

I hereby certify that a copy of the foregoing Brief for Respondent was served upon petitioner by depositing the same in the United States mail at the Main Post Office, Seventh and Mission Streets, San Francisco, California, addressed to the Attorneys for the Petitioner,

MILTON T. SIMMONS, Esq.
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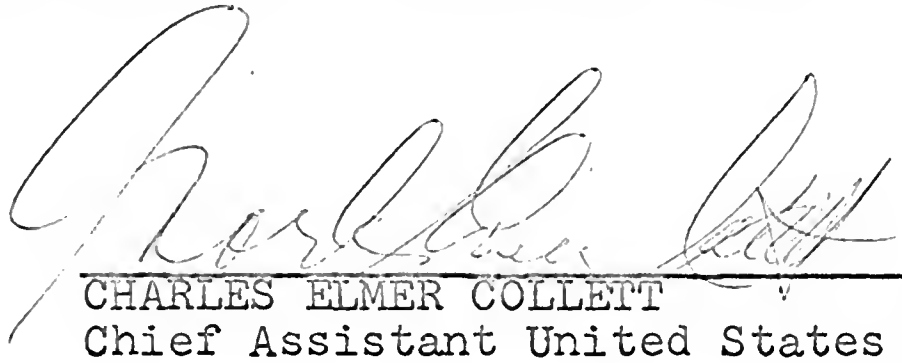

CHARLES ELMER COLLETT
Chief Assistant United States Attorney

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

LUIS SOTO PADILLA, Appellant, vs. THOMAS C. LYNCH, Attorney General of the State of California, JOHN DOE, Chairman of the Adult Authority, ARTHUR L. OLIVER, Warden of Folsom State Penitentiary, Appellees.	)	No. 21924

APPELLEES' BRIEF

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Attorneys for Appellees

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UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

LUIS SOTO PADILLA, Appellant, vs. THOMAS C. LYNCH, Attorney General of the State of California, JOHN DOE, Chairman of the Adult Authority, ARTHUR L. OLIVER, Warden of Folsom State Penitentiary, Appellees.	)	No. 21924

APPELLEES' BRIEF

JURISDICTION

The jurisdiction of this Court is conferred by Title 28, United States Code sections 1215 and 1291 which make a final order in a federal District Court reviewable in the Court of Appeals.

STATEMENT OF THE CASE AND OF THE FACTS

On December 5, 1966, appellant filed a Complaint in the United States District Court for the Northern District of California alleging that appellees had denied him his civil rights. Appellant's Complaint in essence stated that he had been subjected to arbitrary and invidious

discrimination by the California Adult Authority and that as a result had been subjected to greater and different punishment than others in similar circumstances. Appellant asserted that he and a codefendant were convicted of the same crime (possession of narcotics), that the codefendant was paroled in 1963, that the Adult Authority has refused to release appellant on parole and that, therefore, appellant has been deprived of equal protection under the law. Appellant also asserted that the Adult Authority has not released him on parole because of his refusal to act as an investigator or informer for the Department of Corrections and for the California Attorney General. The Complaint prayed for 1) a declaratory judgment that appellant be paroled or shown cause why such parole was denied him; 2) a declaratory judgment directing the Adult Authority to recognize appellant's rights and privileges under the due process clause of the Fourteenth Amendment to the United States Constitution; 3) a permanent injunction against the California Adult Authority and the California Department of Corrections from further deprivation of his liberty in an unconstitutional manner.

On January 27, 1967, appellees filed a Notice of Motion and Motion to Dismiss and Points and Authorities in Support of Motion to Dismiss. On February 7, 1967, appellant filed a Motion in Opposition to the Motion to

Dismiss.

On May 4, 1967, Judge Oliver J. Carter of the United States District Court filed his order granting appellees' Motion to Dismiss.

Appellant filed his Notice of Appeal together with a Motion to Proceed in Forma Pauperis under Title 28, United States Code section 1915, on April 27, 1967. Appellant's request to proceed in forma pauperis was granted by the District Court on May 4, 1967.

SUMMARY OF APPELLEES' ARGUMENT

The Complaint does not state a cause of action.

A. Appellant's allegation that he is being denied parole is not an allegation of a violation of rights under the Constitution or Statutes of the United States.

B. Defendant officials are immune from civil liability.

ARGUMENT

I

THE COMPLAINT DOES NOT STATE A CAUSE OF ACTION

A. Appellant's allegation that he is being denied parole is not an allegation of a violation of rights under the Constitution or Statutes of the United States.

In his Complaint, appellant alleged that he has been denied parole for seven and one-half years whereas

his codefendant convicted of the same crime was released on parole after only three and one-half years, and, therefore, he has been denied equal protection of the laws. Obviously, the decision as to when a prisoner is a fit subject to be released on parole is a determination that must be made as a result of the facts and circumstances concerning each prisoner. The mere fact that a codefendant was released at an earlier date does not, in and of itself, establish that there has been a denial of equal protection of the laws. In Washington v. Hagan, 287 F.2d 332 (3rd Cir. 1960), cert.denied 366 U.S. 970 (1961), the Court stated at page 334:

> "[T]his matter of whether a prisoner is a good risk for release on parole or has shown himself not to be a good risk, is a disciplinary matter which by its very nature should be left in the hands of those charged with the responsibility for deciding the question. . . .
>
> "[T]he problem becomes one of an attempt at rehabilitation. The progress of that attempt must be measured, not by legal rules, but by the judgment of those who make it their professional business."

Appellant also alleges in his brief that the Adult Authority has failed to determine or redetermine

the length of his imprisonment. However, it is fundamental to the California law regarding sentence and parole that every sentence is for the maximum unless and until the Adult Authority acts to fix a shorter sentence. In re Smith, 33 Cal.2d 797, 804 (1949). The Adult Authority may act just as validly, as was done in this case, by considering the case and then declining to reduce the term and denying parole. In re Mills, 55 Cal.2d 646 (1961).

The administration of parole is an integral part of criminal justice having as its objective the rehabilitation of those convicted of crime and as its further objective the protection of the community. Ex parte Tenner, 20 Cal.2d 670 (1942). Parole, however, is not a matter of right but a matter of grace. In re Harris, 80 Cal.App.2d 173 (1947); Gibson v. Markley, 205 F.Supp. 742, 743 (S.D. Ind. 1962); Martin v. United States Board of Parole, 199 F.Supp. 542, 543 (D.C. Cir. 1961); Lopez v. Madigan, 174 F.Supp. 919 (N.D. Cal. 1959). Parole, therefore, is a statutory privilege and not a matter of constitutional significance. Escoe v. Zerbst, 295 U.S. 490, 492 (1935); Jones v. Cunningham, 371 U.S. 236, 242 (1963). Appellant's allegation that he is being denied parole is therefore not an allegation of a violation of rights guaranteed him under the Constitution or

Statutes of the United States. Therefore, he has failed to state a cause of action under Titles 28 or 42, United States Code sections 1331, 1343, 1392, 1979 and 1983. Stiltner v. Rhay, 322 F.2d 314 (9th Cir. 1963), cert.denied 376 U.S. 920 (1964); In re Costello, 262 F.2d 214 (9th Cir. 1958); Dreyer v. Illinois, 187 U.S. 71 (1902); Cox v. Maxwell, 366 F.2d 765 (6th Cir. 1966).

B. Defendant officials are immune from civil liability.

Appellant is attempting to sue the Chairman of the Adult Authority, the Warden of the prison, and the California Attorney General for their failure to grant appellant a parole. It is appellees' position that said officials are immune from civil liability arising out of the authorized performance of official discretionary functions. Recognition of immunity for federal officials performing authorized quasi-judicial acts in the course of their official duty had its origin in the ancient principle that judges are absolutely immune from civil defamation or libel suits arising out of judicial proceedings. See dissenting opinion of Mr. Chief Justice Warren in Barr v. Matteo, 360 U.S. 564, 579 (1959). This protection from unwarranted harassment was first extended by the Supreme Court to heads of federal

executive departments, Spalding v. Vilas, 161 U.S. 483 (1896), and then to authorized statements of lesser officials, Barr v. Matteo, supra. In the latter case, the majority opinion described the underlying policy as follows:

> "The privilege is not a badge or emolument of exalted office, but an expression of a policy designed to aid in the effective functioning of government.
>
> * * * [W]e cannot say these functions become less important because they are exercised by officers of lower rank in the executive hierarchy." Barr v. Matteo, supra at 572-73.

Lower federal courts have not hesitated to expand both the scope and the nature of the immunity. See Preble v. Johnson, 275 F.2d 275 (10th Cir. 1960) (director of maintenance control program at a naval training center); Gamage v. Peal, 217 F.Supp. 384 (N.D. Cal. 1962) (Air Force medical officers and contract psychiatrist immune from action for damages). In Lang v. Wood, 92 F.2d 211, cert.denied 302 U.S. 686 (D.C. Cir. 1937), plaintiff prisoner filed an action for damages alleging that defendant Attorney General, Parole Board members, the Warden of the prison, and others maliciously and arbitrarily revoked his parole. The Court there held:

"[T]he hearing of the revocation of plaintiff's parole in the present case was a subject matter committed by law to the executive control of the defendants as public officers, and in such case error on their part does not expose them to an action for damages, and this is none the less true even though their error be described as arbitrary, capricious, and malicious. See Spalding v. Vilas, 161 U.S. 483, 498 (1896)."

Lang v. Wood, supra at 212.

It is, therefore, submitted that appellees as public officers had absolute immunity for acts done by them in relation to matters committed by law to their supervision.

Finally, appellees submit that a complaint for injunctive relief under the Civil Rights Act by appellant at this time is premature. The basis for appellant's prayer for injunctive relief is alleged illegal confinement in a state prison. The proper and readily available remedy is state and federal habeas corpus. Van Buskirk v. Wilkinson, 216 F.2d 735 (9th Cir. 1954); Johnson v. Walker, 317 F.2d 418 (5th Cir. 1963); Davis v. State of Maryland, 248 F.Supp. 951 (D. Md. 1965). A suit for an injunction under the Civil Rights Act may not be used in place of a petition for a writ of habeas corpus to avoid the requirements laid down by the Supreme Court as well as by this Court, that State prisoners exhaust all available State remedies

before applying to Federal Courts for release from their imprisonment. Johnson v. Walker, 317 F.2d 418 (5th Cir. 1963).

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the order of the District Court dismissing the Complaint should be affirmed.

Dated: September 22, 1967.

THOMAS C. LYNCH, Attorney General
of the State of California

EDWARD P. O'BRIEN,
Deputy Attorney General

Attorneys for Appellees

CR SF
66-1919

CERTIFICATE OF COUNSEL

I certify that in connection with the preparation of this brief, I have examined Rules 18, 19, and 39 of the United States Court of Appeals for the Ninth Circuit and that, in my opinion, this brief is in full compliance with these rules.

Dated: September 22, 1967.

EDWARD P. O'BRIEN
Deputy Attorney General

No. 21926

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

HAROLD ALMUS LANGDON,

Appellant,

vs.

RICHARD D. JACKSON, E. M. OWENS, JOHN A. TIDYMAN,

Appellees.

APPELLEE'S REPLY BRIEF.

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No. 21926

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

HAROLD ALMUS LANGDON,

Appellant,

vs.

RICHARD D. JACKSON, E. M. OWENS, JOHN A. TIDYMAN,

Appellees.

APPELLEE'S REPLY BRIEF.

Statement of the Case.

Appellant invoking Title 42 U.S.C.A., Section 1983 and Title 28, U.S.C.A., Sections 1343(3) and (4) of the Civil Rights Acts brought this action against three police officers of the City of Los Angeles, Officers John A. Tidyman, Richard D. Jackson and E. M. Owens.

The action, filed May 10, 1966, alleges in substance that on an unenumerated day in March, 1958, and again on March 23, 1958, police officers without probable cause or pursuant to a search warrant entered Plaintiff's apartment and unlawfully seized specified personal property of Plaintiff.

In response to Plaintiff's Complaint, Appellees filed a Motion to Dismiss upon the grounds: (1) that the

Complaint fails to state a claim upon which relief may be granted; and (2) the action should be dismissed at this time for the reason that said suit can be brought in a more favorable atmosphere by the Plaintiff after he has been released from a state prison.

The Motion came on regularly for hearing before the Honorable Leon R. Yankwich, United States District Judge, on March 13, 1967. The Court thereafter ordered the action dismissed on March 16, 1967, and such order was entered in the docket the same day. Thereafter, Plaintiff appealed to this Court.

Questions Presented.

(1) Whether the allegations contained in the Complaint show upon its face that the action is barred by the statute of limitations.

(2) Whether Appellant's status as prisoner sentenced to life imprisonment without possibility of parole is such a disability or status that tolls the applicable statute of limitations.

(3) Whether Appellees can raise upon appeal the defense of the statute of limitations where the District Court dismissed the action on the grounds set forth in the motion of Appellees.

ARGUMENT.

Summary of Argument.

The Complaint on its face shows that the three year statute of limitations contained in Section 338(1), Code of Civil Procedure, bars the within action. Appellant's disability, sentenced to death and thereafter on October 8, 1959 commutation of sentence to life imprisonment without possibility of parole, does not toll Section 338-(1), Code of Civil Procedure. This Court can upon appeal from a motion to dismiss for failure to state a claim pursuant to Section 12(b)(6) of the Federal Rules of Civil Procedure review the Complaint before the District Court and affirm dismissal on the grounds the within action is barred by the statute of limitations.

I.

The Complaint on Its Face Is Barred by Section 338(1), Code of Civil Procedure.

The cases are clear that the statute of limitations may be raised by a motion to dismiss for failure to state a claim upon which relief may be granted. (*J. M. Blythe Motor Lines Corp. v. Jean Blalock,* 310 F. 2d 77 (1962).) The applicable statute of limitations involved in an action brought pursuant to Title 42, U.S.C.A., Section 1983, is Section 338(1), Code of Civil Procedure (*Smith v. Cremins,* 308 F. 2d 187).

The Complaint alleges an unreasonable search and seizure of Plaintiff's apartment and property during the month of March in the year 1958. The action was filed May 10, 1966, and is therefore barred by Section 338(1), Code of Civil Procedure.

II.

Appellant's Status, a Prisoner Sentenced to Life Imprisonment Without Possibility of Parole, Does Not Toll Section 338(1), Code of Civil Procedure, and the Action Is Therefore Barred by Reason of Said Section.

Part of Appellant's argument in opposition to Appellees' Motion to Dismiss in the lower Court was based upon the asserted inapplicability of Section 352, Code of Civil Procedure, because of his sentence to state prison for life without possibility of parole. He therefore states that the tolling provision contained in this section was and is inapplicable to his cause of action herein.

It is settled law that Appellant's status as a prisoner does not prevent him from bringing his action under 42 U.S.C.A., Section 1983 in Federal Court. This Court in *Weller v. Dickson,* 314 F. 2d 598, at 601, held that not only does a prisoner have the capacity to bring such an action but also has the *right* to pursue his action in Federal Court.

It follows therefore that Appellant's status as a prisoner does not toll the three year statute of limitations applicable to his cause of action.

III.

Appellees Can Raise on Appeal the Statute of Limitations Where the Motion to Dismiss in the Lower Court Was Upon the Ground That There Was a Failure to State a Claim Upon Which Relief Could Be Granted.

It is an established rule of law that where a Complaint shows upon its face that an action has not been brought within the designated statutory period, such an issue may be raised upon a motion to dismiss (*Rohner v. Union Pacific Railroad Co.,* 225 F. 2d 272). There is also case law to the effect that a reviewing Court will review the entire record before the lower Court and if the decision of such lower Court was based upon the wrong ground or a wrong reason, the reviewing Court will affirm if the result of such decision was correct. (*Lum Wan v. Esperdy,* 321 F. 2d 123). The Federal Court also has held that on appeal from a motion to dismiss pursuant to Section 12(b)(6) of the Federal Rules of Civil Procedure that the Appellate Court can affirm the order of dismissal even though the defense giving rise to such dismissal is asserted for the first time on appeal. (*Southard v. Southard,* 305 F. 2d 730, at 732).

The above cases constitute ample authority for affirmance of the trial court's decision to dismiss the within action. Appellees' motion was under Section 12(b)(6). The Complaint, filed May 10, 1966 and Appellant's sentence having been commuted on October of 1959, was filed more than three and one half years after the statute of limitation period had expired.

Conclusion.

The Judgment of the trial court dismissing Appellant's action against Appellees, John A. Tidyman, Richard Jackson and E. M. Owens, should be affirmed.

Respectfully submitted,

ROGER ARNEBERGH,
City Attorney,

JOHN A. DALY,
Assistant City Attorney,

JOHN T. NEVILLE,
Deputy City Attorney,

Attorneys for Appellees.

Certificate.

I certify that, in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

JOHN T. NEVILLE

No. 21,928

United States Court of Appeals

For the Ninth Circuit

ERNEST DOUGLAS BREDE,
Appellant,

vs.

UNITED STATES OF AMERICA,
Appellee.

Appeal from the United States District Court for the Northern District of California

REPLY BRIEF FOR APPELLANT

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No. 21,928

United States Court of Appeals

For the Ninth Circuit

ERNEST DOUGLAS BREDE,
Appellant,

vs.

UNITED STATES OF AMERICA,
Appellee.

Appeal from the United States District Court for the Northern District of California

REPLY BRIEF FOR APPELLANT

ARGUMENT

I. THE GOVERNMENT IN ITS RESPONSIVE BRIEF DOES NOT DENY THE FUNDAMENTAL FACTS WARRANTING REVERSAL OF THE CONVICTION.

Appellant submits that the judgment and conviction *must be reversed* because of the following six propositions, none of which has been, or can be, controverted by the Government:

1. Appellant did not commit any criminal act unless he violated a "duty" imposed upon him by the Universal Military Training and Service Act.

2. The only "duty" which Appellant allegedly violated was an alleged specific order of his local board

to report to the board for instructions to proceed to a place for civilian employment in lieu of induction.

3. *Express, mandatory* provisions of the Selective Service Regulations *require* the local board *members* to make such an order.

4. The local board members did not have authority or jurisdiction to make such an order on March 14, 1966. Therefore, no order was made at that time.

5. The local board members first had authority and jurisdiction to make such an order on April 20, 1966, when they received specific approval from the National Director of Selective Service to do so.

6. After receiving authority to make such an order, the local board *did not meet* and *did not in fact order* the Appellant to report for civilian work.

The Government is basing its case on the following contentions, none of which has any legal merit:

1. It is immaterial that the local board members never ordered the Appellant to report for civilian work.

2. It is immaterial that express, mandatory provisions of the regulations were violated.

3. Any clerical person in the local board office may *sign* and *mail out* purported orders, even though the orders have not been *issued* by the local board, and yet such "orders" are just as valid as if all legal requirements had been complied with.

4. The presumption of innocence notwithstanding, a citizen of the United States *should be convicted of*

disobeying an order that was never made, as he probably would have violated it if it were made.

5. The fact that the *fundamental basis* of the alleged crime is missing is immaterial; if there were error, it is not prejudicial because the Appellant would have disobeyed a valid order anyway.

II. THE GOVERNMENT IN ITS RESPONSIVE BRIEF HAS MISQUOTED THE RECORD.

On page 5 of its brief, the Appellee in its "Statement of Facts" recites as follows:

> "At the conclusion of the meeting, therefore, the local board reviewed appellant's file, determined that work as an institutional helper at the Los Angeles County Department of Charities was available, was appropriate, and *was to be performed by the appellant* (Exhibit, pp. 12, 52)." (Emphasis supplied by Appellee)

This is an absolute misstatement of the record. At page 52 of the Selective Service File (Exhibit 1) the minutes of the local board meeting on March 14, 1966 state:

> "The local board determined that work as an institutional helper at Los Angeles County Department of Charities, 1200 North State Street, Los Angeles, California 90033 *is appropriate to be performed* by the registrant and such work is available."

It should be noted that the minutes do *not* indicate, as Appellee contends, that the work was to be *per-*

formed by the Appellant, but only that the work was "appropriate" and "available".

The summary of the minutes which appears on page 12 of the File merely omitted the word "appropriate", but cannot supersede the more complete exposition of the minutes on page 52.

In numerous other instances throughout its brief, the Appellee begs the very question in issue by assuming that a valid order was issued on April 20, 1966, when the fact of issuance by the local board members is one of the principal points raised by the Appellant. See pages 6, 11, 13 and 14 of Appellee's brief.

III. THE GOVERNMENT IN ITS RESPONSIVE BRIEF HAS FAILED TO COMMENT ON, OR DISTINGUISH, ANY OF THE CASES CITED BY APPELLANT.

Nowhere in its brief does the Appellee attempt to demonstrate that the cases cited by Appellant on pages 23, 29 and 30 of his brief are not the determinative law on the questions involved herein, or that they do not require the relief sought herein by the Appellant.

The Government has cited but three cases, none of which are applicable here. In *Yaich v. U.S.*, 283 F.2d 619 (9th Cir. 1960), this Court held that a mere technical error or omission on the part of the local board or its clerical personnel would not be sufficient to warrant reversal of a conviction if there was no prejudice to the Appellant. In this case, however, the

error involves, not a minute technicality, but the fundamental basis of the indictment—that is, whether any order was ever issued by the members of the local board.

The other two cases cited by Appellee, *Kent v. U.S.*, 207 F.2d 234 (9th Cir. 1953) and *U.S. v. Lawson,* 337 F.2d 800 (3rd Cir. 1964), Cert. denied 380 U.S. 919 (1965), only relate to the *signing* of an order of the local board *after* the order was *validly issued* by the local board itself. Therefore, Appellee has cited *no authority* to the effect that a local board may delegate the *issuing* of orders, as distinguished from the signing or mailing of them. As pointed out in Appellant's opening brief, page 27, Section 1604.59 of the Selective Service Regulations expressly provides that: "official papers *issued by a local board* may be *signed* by the Clerk of the local board if he is authorized to do so by resolution duly adopted by and entered in the minutes of the meetings of the local board . . ."

Nowhere in the regulations is there *any* provision that the local board may *delegate* the *issuance* of orders.

Webster's Dictionary defines "issue" as "to go forth by authority". In this case, there was *no authority* given by the local board members to their Clerk to *make* an order, but only to *sign* orders which the local board itself had made.

The Government would have this Court believe that the requirements of Regulation 1660.20(d) requiring the National Director to approve the civilian work

selected by the local board is but a meaningless formality.

The National Director, however, has the power both to approve and *disapprove* the work suggested by the local board. It is for this reason that the local board does not have authority or jurisdiction to order a registrant to perform civilian work in lieu of induction until it has received the National Director's approval in this regard.

IV. THE APPELLEE MAKES UNSUPPORTED ASSERTIONS CONCERNING THE SIGNIFICANCE OF THE SENDING OF THE "CURRENT INFORMATION QUESTIONNAIRE."

At page 14 of its brief, Appellee would have this Court believe that the sending of a "Current Information Questionnaire" was "apparently customary procedure". There is not a scintilla of documentary or testimonial evidence in this case which would establish such a contention. The record is void in this respect. Further, Appellant believes that the Government will not deny that the usual and customary procedure after a meeting of the nature of that held on March 14, 1966 is the sending of a "C-140" form, advising the registrant that any new information which he may have presented to the board at that time was not considered sufficient for reopening or reclassification. Therefore, the sending of the "Current Information Questionnaire" (F 53-54) in this case was *not* customary, and the fact that the Appellant was ordered to return it "at once" further indicates that this was not a routine mailing. Therefore, the local

board, not the clerk, should have weighed the new evidence submitted.

V. THIS COURT, AND OTHERS, HAVE HERETOFORE HELD THAT A SPECIFIC, VALID ORDER MUST HAVE BEEN MADE TO SUPPORT A CRIMINAL PROSECUTION.

In *Chernekoff v. United States*, 219 F.2d 721 (9th Cir. 1955), this Court reversed a conviction for refusal to submit to induction as the defendant was never given a specific order. At page 724 thereof this Court stated:

> "Reversal is also required because the appellant never refused to be inducted into the Armed Forces in the manner required by the law in order to warrant prosecution . . . the appellant was not given the prescribed opportunity to step forward, nor the prescribed warning. The Army deemed it useless to apply the Special Regulation to the appellant as he had said he would not if asked to so do step forward and become inducted into the Armed Forces. It does not matter that he might not have changed his mind. He should have been given the opportunity granted him by the Army's own regulation to seriously reflect and to let actions speak louder than words . . . The appellant could well have changed his mind and complied with the 'step forward' procedure had the Special Regulation been followed or 'stood in his tracks' if he desired to adhere to his former statement . . . We hold that . . . appellant was not given a definite opportunity to be inducted or refuse to be inducted at the time provided for induction and that he did nothing to make such opportunity impossible or unnecessary."

In the *Chernekoff* case, the failure of the Government authorities to issue *a specific order directing induction* was held to be a basis for acquittal; similarly, in the present case, *the failure* of the *members* of the local board *to make an order to report for civilian work is similarly defective.*

A further analogy would be presented by the situation in which a Grand Jury did not vote for an indictment, but the foreman nevertheless signed a document purporting to be an indictment. Could any serious contention be made that this was not a material error, or a complete defense to the purported indictment? Would the United States then contend that this was a "mere procedural error", as the Grand Jury would undoubtedly have voted the indictment in any event? The defendant submits that *this is not a procedural technicality that was not prejudicial to the defendant, but rather that it goes to the essence of due process and the question of whether a crime has been committed.* Needless to say, if there is *any* reasonable doubt, the doubt should be resolved in favor of the criminal defendant.

Various cases have held that *if there were a proper order by members of a local board,* the signing of it by an assistant clerk, or coordinator, rather than by the clerk of the board, was merely a ministerial act, and not prejudicial to the defendant even though this constituted a violation of Section 1604.59 of the Regulations. However, the *converse* cannot be true—that is, that the *signing* by a *clerk* makes action by the board *members* unnecessary.

More recently, in *United States v. Anthony Rotella,* District Court, Eastern District of New York, 67 C.R. 122 (February 1, 1968) the issue was whether the defendant had been ordered to report to particular hospital work when he reported to his local board for instructions. In granting the defendant's motion for judgment of acquittal, District Judge Weinstein stated as follows:

> "It seems to me very hard to charge a man in an indictment with *failing to obey the order which was never given,* and since at least on this issue I think that the general criminal rule with respect to reasonable doubt governs, *if there is a reasonable doubt about whether he was in fact given the order* and whether following the order he did fail to respond with requisite bad intent, *then it would seem to me that he must be acquitted.*"
>
> "That seems to me to be very much like *Chernikoff,* which is 219 F. 2d 721, where the Defendant took the same position, and apparently the Army didn't ask him to take a step forward, and the Court says that that indicates he didn't disobey an order."
>
> "Now I don't know what was in this man's mind and I don't think its vital to this case, because what is vital to it is that the Selective Service forms require that he proceed to the place of employment pursuant to instructions, and it's got to be pursuant to instructions."
>
> "Now whether those instructions need only be 'Report to this place,' or whether they have to go into detail I don't have to decide now, because he wasn't given any instructions at all so far as this evidence shows."

"Well I think that's what happened: They thought it was useless, but the technical problem is *you can't be accused of violating an order if you are not given the order.* You may be accused of having an intent to violate, but I suppose even in the Army if somebody says 'if that lieutenant gives me an order I'm not going to do it, I'm not going to do what he says,' and the lieutenant then says 'I'm not going to give him the order because it's useless,' he can't then be accused of violating the order that wasn't given."

"He can be accused of other things, but not of violating the order that wasn't given."

"It seems to me that he is not guilty unless he is ordered, and that's what disturbs me."

"And then there must be a record made right then and there that this fellow was ordered and didn't do it. It's probably repeated to him so he is under no illusion as to what he is to do. Because *that is the critical jural step that marks this man as either a law-breaker or not,* and that jural step cannot be ignored, it is critical."

"On the basis of the evidence before me I have a reasonable doubt as to whether he was ever ordered to report to Kings Park State Hospital after he reported to the local board at 9:00 a.m. on the 3rd day of May, 1966 or in the words of Form 153, whether he was ordered 'to proceed to the place of employment pursuant to instruction.'

"In view of that reasonable doubt which I entertain in this case I have no alternative but to dismiss the case, and therefore the defendant's motion is granted."

"The defendant is discharged."

VI. THE GOVERNMENT IS CONTENDING THAT IT SHOULD NOT BE REQUIRED TO FOLLOW THE CLEAR MANDATE OF ITS OWN REGULATIONS; ITS ARGUMENT SHOULD BE ADDRESSED TO CONGRESS OR THE EXECUTIVE BRANCH RATHER THAN TO THIS COURT.

In essence, it appears that the Government is contending as follows in this case:

1. We don't have to follow the express, mandatory regulations which require the local board members to issue an order;

2. We don't have to follow our own regulations as to what persons may properly sign orders issued by local boards;

3. The local board may require that a registrant provide new "current information", and yet delegate to the Clerk the question of whether any such new information is worthy of consideration by the local board;

4. The Government does not have to obey the duties imposed upon it by the Act or regulations, but the Appellant must obey them to the letter or be liable for years of imprisonment.

CONCLUSION

Wherefore, the Appellant prays that the judgment of the District Court be reversed and the cause remanded with directions to the trial court to enter a judgment of acquittal and discharge the Appellant.

Dated, San Francisco, California,
March 4, 1968.

Respectfully submitted,
CLARK A. BARRETT,
Counsel for Appellant.

CERTIFICATE OF COUNSEL

I certify that, in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

CLARK A. BARRETT,
Counsel for Appellant.

No. 21,928

United States Court of Appeals

For the Ninth Circuit

ERNEST DOUGLAS BREDE,
Appellant,

vs.

UNITED STATES OF AMERICA,
Appellee.

Appeal from the United States District Court for the Northern District of California

BRIEF FOR APPELLANT

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No. 21,928

United States Court of Appeals

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Appeal from the United States District Court for the Northern District of California

BRIEF FOR APPELLANT

JURISDICTION

This is an appeal from a judgment of conviction rendered and entered by the United States District Court for the Northern District of California (CT 2).[1] The District Court had jurisdiction pursuant to Title 18, United States Code, Section 3231.

The indictment charged an offense in violation of the Universal Military Training and Service Act (Title 50, United States Code App., Section 462)—Failure to Report for Civilian Work (CT 2).

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[1]Numbers preceded by "CT" denote the applicable pages of the Clerk's Transcript of the Record.

This Court has jurisdiction of this appeal pursuant to Title 28, United States Code, Sections 1291, 1294 and Rule 37(a) (1) and (2) of the Federal Rules of Criminal Procedure, as the Notice of Appeal was filed in the time and manner required by law (CT 11-12).

STATEMENT OF THE CASE

Appellant was charged by an indictment alleging that on or about May 3, 1966 in the City of San Mateo, County of San Mateo, he:

> "wilfully and knowingly did fail and neglect to perform a duty required of him under and in the execution of the Universal Military Training and Service Act, as amended, and the rules and regulations and direction duly made pursuant thereto, in that he did fail and neglect to comply with an order of his local board to report to said board for instructions to proceed to the Los Angeles County Department of Charities, Los Angeles, California, (place of employment) to report for employment pursuant to such instructions, and to remain in such employment for twenty-four (24) consecutive months or until such time as released or transferred by proper authority." (CT 2)

After pleading not guilty (CT 13) and waiving trial by jury (CT 3), appellant was tried by the Court on May 18, 1967 (CT 13-14). Appellant was found guilty as charged on May 18, 1967 (CT 14), and was sentenced to imprisonment for 18 months on May 23, 1967 (CT 10).

STATEMENT OF FACTS

Appellant was 20 years old at the time of his conviction. He became 18 years old on May 30, 1956, and registered with his local board in San Mateo, California shortly thereafter (F 1, 2).[2] On June 30, 1964 he completed his classification questionnaire (SSS Form No. 100) in which he indicated that he had been an ordained minister of Jehovah's Witnesses since 1959; that he was a student preparing for the ministry pursuing a full-time course of instruction, and that he was a conscientious objector. He indicated that he had no other occupation and stated "Prefer minister's classification" (F 7-9). He received the Special Form for Conscientious Objector (SSS Form No. 150) from his local board and completed and returned it by August 10, 1964 (F 22-25). The appellant claimed exemption from both combatant and non-combatant training and service in the armed forces (F 22). He also received, completed and returned to the local board by August 10, 1964 the questionnaire for registrants claiming IV-D in which the appellant explained his duties as a minister, his attendance at ministry school, indicated that he attended five congregation meetings weekly, and described other ministerial activities. The registrant indicated that he was then working about 40 hours per week as a house painter, but stated "I plan within the next year to become

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[2]Numbers preceded by "F" appearing in parenthesis herein refer to the pages of the Selective Service File (plaintiff's Exhibit 1.) Such page numbers, written in longhand, generally appear at the bottom of each page in the file.

a full-time Pioneer [Minister] and get a part-time job to support myself" (F 14-21).

Appellant was thereafter classified as I-O on September 14, 1964 by his local board. He did not appeal this classification (F 12).

Although appellant's Selective Service No. was not reached for induction until December 22, 1965 (F 59), the local board started to process him for civilian work in lieu of induction in November, 1965, by sending to him the "Special Report for Class I-O registrants" (SSS Form No. 152) (F 39-42). This form specifically advised appellant that if he did not submit three types of approved civilian work which he would offer to perform in lieu of induction the local board would submit three such types of approved work to him thereafter. He was advised in writing that if he did not accept any of these types of work, he would have a meeting with the local board in an attempt to reach an agreement with the board as to the type of work he would perform. This statement then provided:

> "If no agreement can be reached at such meeting *the local board, after approval by the Director of Selective Service, will order you to perform such work as is deemed appropriate by the local board.*"[3]

This same written statement to the appellant further provided that *after* the local board has received approval by the Director of Selective Service, and

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[3]In this instance as in all others throughout this brief unless otherwise noted, empahsis is supplied.

after the local board orders him to perform such work, he would be "mailed an Order to Report for Civilian Work and Statement of Employer" (SSS Form No. 153) (F 39).

The appellant returned the Special Report for Class I-O Registrants to his local board on November 29, 1965, but did not offer to perform any civilian work in lieu of induction (F 40).

Three days later, on December 20, 1965, the local board forwarded appellant's file to California State Headquarters, requesting that the State Director forward three types of available appropriate employment (F 43). On December 22, 1965 the State Director returned the file to the local board indicating that three specified types of civilian work were "available . . . *at the present time*" (F 44).

On January 3, 1966 the local board forwarded to appellant the three types of work specified by the State Director. The appellant returned this letter indicating that he did not wish to perform any of the types of work indicated because of his conscientious objection; he indicated that he was an ordained minister and that to perform this work would be a compromise with his dedication to God (F 45-46).

Subsequently, the appellant's file was again forwarded to State Headquarters for instructions as to the appointment of a state representative to meet with the registrant (F 47). The State Director notified the local board on January 28th as to the procedure to be followed and stated *inter alia,*

> "Unless the file contains *current* information that such work is available, the State Director should be requested to obtain such information" (F 48).

On February 7, 1966, the appellant was directed to appear at a meeting with his local board on February 14th (F 49). Although appellant appeared on February 14th at the local board, there was no representative of the State Director present. The local board therefore considered this matter and, by a vote of 3-0, advised the appellant that the interview would be rescheduled and that he would be advised of a new date (F 12).

On February 25, 1966, State Headquarters wrote to the local board advising them that their letter of February 7th addressed to the appellant was *a violation of the Selective Service Regulations* and that a new meeting should be scheduled later (F 50). The registrant was subsequently advised of a meeting to be held on March 14, 1966 (F 51).

After meeting with the appellant on March 14, 1966, the local board determined, again by a vote of 3-0, that work as an institutional helper at the Los Angeles County Department of Charities was appropriate to be performed by the appellant, and that such work was available. The minutes of this meeting are signed by J. MacLeod, Clerk (F 52).

The action of the local board on March 14, 1966 did *not* constitute an "order" that this appellant report for civilan work in lieu of induction, as the local board

did not have authority or jurisdiction to so order him at that time. It only received authority and jurisdiction to order the appellant to report for civilian work *after* it had received the approval to do so from the National Director (CFR Sec. 1660.20). Nor did the local board authorize its Clerk to order appellant to report for civilian work on March 14, 1966.

The Selective Service file next indicates that the local board desired more information relating to the appellant, for on March 15, 1966, a "Current Information Questionnaire" (SSS Form 127) was sent to him, also signed by J. MacLeod (F 53). This questionnaire includes the following language:

> "The law requires you to fill out and return this questionnaire on or before the date shown to the right above in order that your local board *will have current information to enable it to classify you*" (F 53).

The final statement on said questionnaire advised the appellant of the penalty for knowingly making any false statement or certificate "*regarding or bearing upon a classification*" (F 54).

Appellant returned this form on March 24, 1966 (F 53). For the first time in almost two years, from the date of his registration on June 4, 1964, the appellant indicated to the local board that he was employed as a cashier (F 54). In none of his previous reports to the local board did the appellant indicate that he had any other work experience than as a house-painter (F 7, 18, 23, 41). This was new information that had never

before been considered or available to the local board, and which might have influenced the local board as to the type of civilian work the registrant should be ordered to perform in lieu of induction.

Notwithstanding this new information, the same day the Current Information Questionnaire was returned to the local board the appellant's file was forwarded to State Headquarters for transmitting to the National Director requesting "that the Director approve and authorize the ordering of subject registrant to perform the above specific work." The letter of transmittal was signed by J. MacLeod, Clerk (F 55).

On March 28, 1966 California State Headquarters forwarded appellant's file to National Headquarters, indicated that the local board had determined that specific civilian work was available and stated "the local board *requests authority* to so order him" (F 58). The Director of Selective Service notified State Headquarters on April 14, 1966 that "the issuance of an order by the local board . . . is approved" (F 57).

The State Director of Selective Service wrote to the local board on April 19, 1966, returned the file of the appellant to the local board, and advised the local board that the National Director had given his approval for the appellant to be ordered to report for civilian work in lieu of induction. It should be noted that this letter is addressed, *not to the clerk of the local board,* but to "Gentlemen"—the board members themselves. The letter specifically provides that "the *registrant should be ordered to report* to his local

board office . . .", and that the *clerk* should take certain specific action as to preparation of instructions, preparing a statement in the event the registrant failed to appear, etc. (F 56).

The minutes of the local board indicate that it *did not meet* after receiving the new information concerning the appellant's actual employment, *did not meet* after the National Director granted authority to the board to order the appellant to report for civilian work, *did not authorize the purported "order to report for civilian work" to be sent,* and *did not order the appellant to perform such work* (F 13).

In spite of the fact that the local board had not considered the information it had requested in the "current information questionnaire", had not met after receiving authorization from the National Director, had not ordered the appellant to report for civilian work, and had not authorized the clerk of the board to issue such an order, on April 22, 1966 a purported "Order to Report for Civilian Work" (SSS Form No. 153) was sent from the local board office by Barbara Jones to the appellant herein, in which it was indicated that he was to report to the local board on May 3, 1966, to receive instructions to proceed to the place of employment (F 60).

As of March 24, 1966 J. MacLeod was *the only person* designated as the *Clerk* of the local board (RT 23).[4]

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[4]Numbers preceded by "RT" denote the applicable pages of the Reporter's Transcript of the trial proceedings.

It appears that Barbara Jones did not actually have the position as Clerk of local board 57 until September 19, 1966 (RT 26; Defendant's Exhibit "B"). Although Barbara Jones purportedly signed the order of April 22, 1966 as Clerk of the local board, *she was not even recommended for appointment as Clerk until June 21, 1966,* two months *after* the purported "Order" was sent to appellant (RT 28-29; Defendant's Exhibit "C").

The reverse of SSS Form No. 153 further indicates that official local board action is necessary to order any registrant to report for civilian work. The instructions on the reverse provide in part:

> "An original and five copies of this form shall be prepared by the local board for each registrant *ordered to report for civilian work contributing to the national health, safety, or interest.*" (F 61)

The appellant received the purported order to report as indicated by his letter to the board of May 2, 1966 (F 63-66), but refused to report because of his religious convictions. The file reflects the fact that the appellant did not report on May 3, 1966 (F 67). This prosecution followed.

QUESTIONS PRESENTED AND HOW RAISED

I

If a local board has received *authority* from the National Director of the Selective Service System to order a registrant to perform specific civilian work in lieu of induction, but *does not thereafter meet, does*

not consider the registrant's file, does not make or issue an order to report for civilian work, and does not authorize its Clerk to do so, may such an order to report nevertheless be issued by one of the clerical personnel at the local board's office?

II

As the governing selective service regulations provide that "official papers issued by a local board may be signed by the Clerk of the local board if he is authorized to do so by resolution duly adopted by and entered in the minutes of the meetings of the local board," may an Order to Report for Civilian Work be directed to a registrant when (1) such order was not issued by the local board, (2) the Clerk was not authorized to issue such an order, and (3) the order was signed by one of the clerical personnel who had not been appointed Clerk?

III

After a local selective Service board requires a registrant to provide "current information to enable it to classify you", and after receipt of new information from the registrant which might have influenced the local board as to the type of civilian work the registrant should perform in lieu of induction, is the local board justified in ignoring this new information or the effect it might have on the registrant's classification or the work to which he would be assigned? Is the failure to consider such information a denial of substantive or procedural due process?

IV

When the California State Director of the Selective Service System specifically advises a local board that unless the registrant's file contains "current information" that specific civilian work is available, the local board should contact the State Director, does the local board have the authority to issue an Order to Report for Civilian Work some 4½ months after it has been advised that certain work is available, without seeking further information from State Headquarters?

V

Were procedural and substantive due process denied to appellant by his local selective service board in matters relating to his classification and the purported "Order to Report for Civilian Work" in lieu of induction?

VI

Did the Trial Court err in denying appellant's motion for judgment of acquittal, as the evidence produced at the trial was legally insufficient to sustain a judgment of guilty?

All of the aforesaid questions were raised by appellant's motion for judgment of acquittal presented to the trial court at the close of the government's case (CT 4-9); (RT 37-60; 70-76).

SPECIFICATION OF ERRORS

1. The District Court erred in denying appellant's motion for judgment of acquittal as no valid "Order to Report for Civilian Work" was ever issued or directed by the local selective service board.

2. The District Court erred in denying appellant's motion for judgment of acquittal as the local selective service board never authorized its Clerk to issue the purported Order to Report for Civilian Work directed to this appellant.

3. The District Court erred in denying appellant's motion for judgment of acquittal as the purported Order to Report for Civilian Work was not signed by the Clerk of the local board, as required by Selective Service Regulations.

4. The District Court erred in denying appellant's motion for judgment of acquittal as the local board specifically requested new information concerning appellant's current status, and yet failed to meet or consider the new information after the appellant had provided the board with it.

5. The District Court erred in denying appellant's motion for judgment of acquittal as the purported Order to Report for Civilian Work was sent from the local board office without any indication that the work appellant was purportedly ordered to perform was in fact "currently available".

6. The District Court erred in denying appellant's motion for judgment of acquittal as the evidence produced at the trial demonstrated that appellant was

deprived of both procedural and substantive due process by his local board.

7. The District Court erred in denying appellant's motion for judgment of acquittal as the evidence produced at the trial was legally insufficient to sustain a judgment of guilty.

ARGUMENT

SUMMARY

There are three principal points upon which the appellant relies in this appeal. They are as follows:

1. The local board did not have authority to issue any order to report for civilian work in lieu of induction unless and until it had received authorization from the National Director. Further, that after receiving such authorization, the local board did not meet, did not consider the registrant's file, did not issue such an order itself, and did not authorize its Clerk to do so. In such circumstances, appellant submits that the presumption of administrative regularity cannot overcome the absolute failure of proof in the government's case. If there were any doubts as to the validity of the purported order, as the appellant is entitled to a presumption of innocence, the doubts should have been resolved in his favor.

2. As the local board required the appellant to submit a "Current Information Questionnaire", when the appellant provided new information which might have had a bearing upon the appellant's classification or the type of civilian work he would be ordered to

perform, the local board failed to afford appellant procedural and substantive due process as it did not consider this new information. The local board was without jurisdiction to delegate matters of discretion and policy to a clerk to determine whether or not the new information submitted might or might not have effected local board orders.

3. The Selective Service Regulations specifically provide that only members of the local board or the Clerk thereof may sign official documents, and that the Clerk may do so only if authorized by resolution. In this case, although the Clerk of the Board was in the same office, the purported order was issued over the signature of one of the clerical personnel who had not even been recommended for appointment as Clerk at the time she signed the order. The order was, therefore, not validly issued.

I

NO VALID "ORDER TO REPORT FOR CIVILIAN WORK" WAS EVER ISSUED OR DIRECTED TO THE APPELLANT BY HIS LOCAL SELECTIVE SERVICE BOARD

The United States Code, Title 50 App., Section 462(a), provides penalties for any person who neglects or refuses "to perform any duty required of him." The only "duty" referred to in the indictment against the appellant in this case is an alleged "order of his local board to report to said board for instructions . . ." (CT 2). Therefore, unless there was, in fact, a valid order of the local board directing appellant to perform

a duty required of him, the defendant should have been acquitted by the District Court and his conviction should now be reversed by this Court. The defendant contends that no valid order was ever issued by the local board, and that he therefore did not commit any criminal act in failing or refusing to perform any purported order.

The two crucial dates in this regard are March 14, 1966—the date of appellant's meeting with his local board—and April 22, 1966—the date the purported "order" was sent from the local board office by one of the clerical personnel.

The appellant does not contend that there was any procedural or substantive error concerning local board action prior to March 14, 1966. On that date the appellant, a representative of the State Director, and the local board met pursuant to the specific provisions of Selective Service Regulations, Section 1660.20(c).[5] As no agreement was reached at that meeting as to the type of work to be performed, the local board was required to follow the specific procedures set forth in Section 1660.20(d) of the regulations.[6] This Section is as follows:

> "If, after the meeting referred to in paragraph (c) of this section, the local board and the registrant are still unable to agree upon a type of civilian work which should be performed by the registrant in lieu of induction, the local board, with the approval of the Director of Selective

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[5]32 CFR Section 1660.20(c).

[6]32 CFR Section 1660.20(d).

> Service, shall order the registrant to report for civilian work contributing to the maintenance of the national health, safety, or interest as defined in § 1660.1 which it deems appropriate, but such order shall not be issued prior to the time that the registrant would have been ordered to report for induction if he had not been classified in Class I-O, unless he has volunteered for such work."

It is to be noted that the local board did *not* have authority or jurisdiction to order the appellant to report for civilian work in lieu of induction *unless and until* the local board had obtained the approval of the Director of Selective Service. Therefore, it is obvious that *the local board did not make any order for the appellant to report for civilian work on the evening of March 14, 1966.* The minutes of the local board meeting indicate that *no order was made that evening* (F 13, 52). *Therefore, as of March 14, 1966 the local board had not "issued" any order directing the appellant to report for civilian work in lieu of induction, and had not "authorized" the Clerk to issue such an order on its behalf.*

Section 1604.59 of the Selective Service Regulations[7] provides as follows:

> "Official papers *issued* by a local board may be signed by *the clerk* of the local board if he is *authorized* to do so by resolution duly adopted by and entered in the minutes of the meetings of the local board, provided, that the chairman or a member of the local board must sign a particular

[7] 32 CFR Section 1604.59.

> paper when specifically required to do so by the Director of Selective Service."

The fact that the local board had *not* ordered the appellant to report for civilian work is amply demonstrated by the succeeding documents in appellant's file. On March 24th the file was forwarded to the National Director via State Headquarters. The letter of transmittal stated in part:

> "It is *requested* that the Director approve and *authorize the ordering* of subject registrant to perform the above specific work" (F 55).

The State Director forwarded appellant's file to the National Director on March 28, 1966; and, after mentioning the type of civilian work which the local board had determined was available, stated as follows:

> *"The local board requests authority to so order him"* (F 58).

The National Director's office granted the request of the local board and, by its letter of transmittal to the California State Director, advised as follows:

> *"The issuance of an order by the local board . . . is approved"* (F 57).

California Headquarters returned the appellant's file by letter of April 19, 1966. This letter was *not* addressed to the Clerk of the local board, but to "Gentlemen"—the board members themselves. The letter specifically provides that "the registrant should be ordered to report to his local board office . . ." (F 56). *The letter does not state that the Clerk may issue an*

Order to Report for Civilian Work without further board action.

The matters which State Headquarters directs the Clerk to do, *after the order has been made by the local board,* are specifically set forth in the remaining portions of this letter. The Clerk is directed to prepare instructions to the registrant, and to sign and to prepare and sign a statement noting the failure of the registrant to appear, if this is the case (F 56). It is noteworthy that the State Director did not even request or instruct the Clerk to prepare or sign the "Order to Report for Civilian Work"; this is doubtless because the Clerk could not even sign such an order unless expressly authorized to do so by the local board.[8]

The evidence was uncontradicted that, after the receipt of the abovementioned letter from State Headquarters on April 20, 1966 (see receipt date at upper right portion of letter at F 56), *the local board did not meet, did not consider the appellant's classification or assignment to any particular form of civilian work, did not order him to report for such work, and did not authorize or direct the Clerk to so order him.* There are *no* documents in Plaintiff's Exhibit 1 which would substantiate or prove any of these acts, and the minutes of the local board do not reflect any such action (F 13). The person who was Clerk of the local board at this time—April 22, 1966—testified that the local board would have met on April 4th or 11th, 1966

[8]See 32 CFR Section 1604.59.

(*prior* to obtaining the approval of the National Director), and that she had no recollection of any special meeting during April (RT 31-32).

In the administration of the Selective Service System, it is obvious that there are certain actions which must be taken by "the local board"—that is, by official action of the members of the board—and other actions of a purely routine nature which may be performed by the Clerk on behalf of the board *if* the authority to do so has been delegated to him.

Section 1623.1(a) of the Regulations[9] "Commencement of Classification" provides in part as follows:

> "Each registrant shall be classified as soon as practicable after his Classification Questionnaire (SSS Form No. 100) is received by the local board . . ."

Acting pursuant to this regulation, the *members* of the local board met on September 14, 1964, and, by a vote of 4-0, classified the appellant in category I-O (F 3, 12).

When the appellant first appeared in person before the local board on February 14, 1966, no representative of the State Director was present as the local board had provided insufficient notice of the meeting in violation of Regulation 1660.20(c).[10] The local board, even on this procedural matter, voted 3-0 that the meeting would be rescheduled and that the appellant would be advised of a new date (F 12). The only

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[9]32 CFR Section 1623.1(a).

[10]32 CFR Section1660.20(c).

other instance in which the local board members met and voted, as indicated by the appellant's file, was at the meeting of March 14, 1966, when they determined, by a vote of 3-0, that work at the Los Angeles County Department of Charities was "appropriate to be performed by the registrant and that such work was available" (F 52).

Two other facts should be mentioned here: First, the "Special Report for Class I-O Registrants" provides that:

> "If no agreement can be reached at such meeting *the local board,* after approval by the Director or Selective Service, *will order you to perform such work as deemed appropriate by the local board".* (F 39).

It is noteworthy that this Selective Service Form does *not* indicate that the *Clerk* of the local board shall make such an order, but that *the local board itself* will order the registrant to perform such work.

The language in this selective service form is consistent with the terms of Section 1660.30 of the Regulations.[11] This regulation provides in part as follows:

> "Any registrant who knowingly fails or neglects to obey an *order from his local board* to perform such civilian work contributing to the maintenance of the national health, safety, or interest in lieu of induction shall be deemed to have knowingly failed or neglected to perform a duty required of him under Title I of the Universal Military Training and Service Act, as amended."

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[11]32 CFR Section 1660.30.

The language "an order from his local board" obviously cannot mean the unauthorized sending of a selective service form by any of the clerical personnel in the local board office, but can only logically be interpreted to be an instance in which the local board has met and exercised its judgment in determining that any such an order shall issue.

Secondly, much of the correspondence in the appellant's Selective Service File, when issuing from the local board office, contains the statement "By Direction of the Local Board."[12] However, the purported "Order to Report for Civilian Work" does not even bear this statement (F 60).

There are *no* Selective Service Regulations which authorize a Clerk or other ministerial person to issue a formal order without a meeting and determination by members of the local board. Even the signing of official papers by the Clerk is specifically limited by the provisions of Section 1604.59 of the Regulations, referred to above.[13]

Finally, Section 1604.56[14] provides in part as follows:

> "Each local board shall elect a chairman and a secretary. A majority of the members of the local board shall constitute a quorum for the transaction of business. A majority of the members present at any meeting at which a quorum is present *shall decide any question or classification.* Every

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[12]E.g., F 43, 45, 47, 49, 51.

[13]32 CFR Section 1604.59.

[14]32 CFR Section 1604.56.

member present, unless disqualified, shall vote on every question or classification".

It is obvious that the determination of whether or not a registrant is to be ordered to report for civilian work in lieu of induction is a "question" within the meaning of said section. It is to be noted that this regulation is in mandatory—*i.e.* "shall"—language. In other cases in which local boards have failed to abide by mandatory language of the regulations the Courts have uniformly held that judgments of acquittal must be directed.[15]

Appellant submits that there are substantial differences between cases in which registrants are ordered to report for induction in the armed forces, and those, like the present case, in which an order to report for civilian work in lieu of induction is involved. In induction cases, once the number of men to be inducted in any given month is given to the local board, the question of which registrant goes first is predetermined, as the order of induction depends upon the birthday of each registrant.[16] Once a registrant's number has been reached for induction, all further decisions are in the hands of the military services rather than the local board. Whether a registrant passes the pre-induction physical is determined by armed forces personnel, as is the question of whether he is inducted

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[15]*See Boyd v. U.S.*, 269 F. 2d 607 (9th Cir., 1959); *U.S. v. Zieber*, 161 F. 2d 90 (3rd Cir., 1947); *Atkins v. U.S.*, 204 F. 2d 269 (10th Cir., 1953).

[16]See 32 CFR Sections 1631.7, 1632.1-16. There are certain exceptions, of course, such as delinquent registrants and volunteers, that are not applicable here.

into the army, navy, air force, marines or coast guard, depending upon the status of the military services and their calls for personnel at any particular time.

Just the opposite is true in proceedings involving civilian work in lieu of induction. Up to the time the local board makes and issues its order, it must in effect make a determination that the work is currently available; that the registrant is qualified to perform it; that there is no new evidence in the registrant's file which would indicate that any change in civilian work assignment is appropriate; and that the registrant should be ordered to report for instructions. All of these matters involve discretion and judgment on the part of the members of the local board which is totally absent in induction cases.

II

AFTER ADVISING THE APPELLANT THAT HIS CLASSIFICATION WAS STILL UNDER REVIEW, AND REQUIRING HIM TO SUBMIT NEW INFORMATION, THE LOCAL BOARD FAILED TO CONSIDER THE NEW INFORMATION

Appellant's Selective Service File reflects that, after the meeting with the registrant on March 14, 1966, the local board desired further information from him. As a result, a "Current Information Questionnaire" (SSS Form 127) was mailed to the appellant on March 15, 1966 (F 53-54). It is apparent that this was not a "routine" mailing, for on the face of the form at the portion reading "Complete and return before.....", the word "before" is crossed out and the

additional words *"at once"* are added (F 53). Ordinarily, registrants are given 10 days or more to complete and return such forms.

Two other portions of this form are of particular interest: The first sentence thereof provides:

> "The law requires you to fill out and return this questionnaire on or before the date shown to the right above *in order that your local board will have current information to enable it to classify you."*

The final statement of the form provides:

> "Notice.—Imprisonment for not more than five years for a fine of not more than $10,000.00, or both such fine and imprisonment, is provided by law as a penalty for knowingly making or being a party to the making of any false statement or certificate *regarding or bearing upon a classification"* (F 54).

The appellant was required by law to complete and return this questionnaire.[17] If he failed to perform this duty, he would have been a delinquent as defined in Section 1602.4 of the Regulations.[18] In such event, appellant could have been reclassified in class I-A-O and ordered to report for induction.[19]

Appellant returned the "Current Information Questionnaire" on March 24, 1966, and, for the first time, advised his local board that he was engaged in an occupation other than that of a student or house-

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[17]See 32 CFR Section 1623.1(b).

[18]32 CFR Section 1602.4.

[19]32 CFR Sections 1642.10-1642.21.

painter, to wit, a cashier at San Francisco International Airport. Had the local board considered this new information, it could have had a bearing upon the type of civilian work he would be ordered to perform in lieu of induction.

However, the appellant's Selective Service File contains no indication that the local board ever considered this information prior to the time the purported order to report was issued by one of the clerical personnel (F 13). In fact, the minutes of the local board (F 13) do not even reveal the receipt of this information by the local board, although in each and every other instance in which the appellant returned selective service forms to the local board, the receipt was duly entered in the minutes (F 12).

Appellant submits that the "Current Information Questionnaire" was not sent out on March 15, 1966, without any purpose whatsoever, particularly in view of the fact that the appellant was ordered to return said questionnaire "at once". Yet, there is absolutely nothing in the file to indicate that the local board ever met or considered the new information which might have resulted in some change in the registrant's status, work assignments, etc. In situations of this kind, it is not for the trial court to presume by guess, speculation or conjecture what the local board would or would not have done. As the local board required new information, and received it, it was error for the board not to have considered it. As the purported "order" was sent from the local board without any consideration by the board members of this new in-

formation, appellant was not afforded procedural or substantive due process. Therefore, his failure to obey the purported "order" did not constitute a criminal act.

III

THE PURPORTED "ORDER" TO REPORT FOR CIVILIAN WORK WAS NOT VALID, AS IT WAS NOT SIGNED BY ANY DULY AUTHORIZED PERSON

Section 1604.59 of the Selective Service Regulations[20] provides in part that:

> "Official papers issued by a local board may be signed by the Clerk of the local board if he is authorized to do so by resolution duly adopted by and entered in the minutes of the meetings of the local board . . ."

It is to be noted that this regulation does not refer to "all clerical personnel", but specifically mentions "*the* clerk". The uncontradicted evidence is that Barbara Jones, the person who signed the "Order to Report for Civilian Work" was *not* the Clerk of local board No. 57, San Mateo County, at that time. Indeed, it appears that she was not even recommended for this position until June 21, 1966, some two months later (Defendant's Exhibit C; RT 28-29). The file indicates that Barbara Jones was not actually appointed Clerk until September 19, 1966 (Defendant's Exhibit B; RT 26).

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[20] 32 CFR Section 1604.59.

The language in Government's Exhibit 2 to the effect that the "local board passed unanimous resolution authorizing clerical personnel to sign all forms and orders necessary to completion of local board business" is not sufficient to remedy the procedural defects in this case. Firstly, the governing regulation is that of Section 1604.59,[21] which provides that papers may *only* be signed by "*the* Clerk" *not* by "clerical personnel". Secondly, it is obvious that the Government Exhibit 2 can only apply to or authorize the Clerk to sign or issue orders, *once the orders have been made by the local board.* That is, the ministerial act of signing orders may properly be delegated to a Clerk, but the policy decision—the making of the order—cannot be so delegated. As previously mentioned, Section 1604.56 requires the members of the local board to decide "any question or classification."[22]

The appellant submits that, by virtue of all of the aforesaid facts, there was simply no valid order by the local board directed to him to report for civilian work in lieu of induction. There is a complete failure of proof that either the local board ordered the appellant to report, or that it authorized its clerk to do so on its behalf.

At various times the Ninth Circuit Court of Appeals and other federal courts have held that, if there is any question concerning the validity of local board orders, any doubt must be resolved in favor of the appellant, and that in cases involving the liberty of

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[21]32 CFR Section 1604.59.

[22]32 CFR Section 1604.56.

defendants, a presumption of administrative regularity is not sufficient to overcome defects in the proceedings.

In *Franks v. United States,* 216 F. 2d 266 (9th Cir., 1954) the Court, in reversing the defendant's conviction stated as follows at page 269:

> "In a criminal prosecution of this kind, the burden is upon the Government to establish the validity of the induction order, and if the matter which we here mention has a bearing upon that validity, than *we must view the record in the light most favorable to the appellant* as we proceed to construe its meaning."

In *Kretchet v. United States,* 284 F. 2d 561 (9th Cir., 1960) the Court, in reversing the defendant's conviction stated as follows at page 566:

> "It was encumbent upon the United States to prove a valid induction order as a basis for appellant's conviction."

In *Knox v. United States,* 200 F. 2d 398 (9th Cir., 1952) the Court, in reversing the defendant's conviction, stated at page 402:

> "But, it is suggested, a presumption of regularity or of the due performance of duty attends official action; and it should be presumed in this instance not only that the local board considered the claims of the registrant, but in the light of them it took action to continue in effect his original I-A classification. *We think the Court may not indulge the presumption, at least in the latter respect,* in the condition of the records in the case."

In *United States v. Stetler,* 258 F. 310 (3rd Cir., 1958) the Court, in reversing the defendant's conviction, stated at page 316:

> "Good faith and honest intention on the part of the local board is not enough. There must be full and fair compliance with the provisions of the Act and the applicable Regulations."

Finally, in *United States v. Alvies,* 112 F. Supp. 618 (N.D. Cal. 1953) District Judge Oliver J. Carter stated as follows:

> "But assumptions on the part of the court cannot substitute for evidence where the result would be to convict a man of a felony. As the Supreme Court said in the Estep case, supra, 327 U.S. at pages 121-22, 66 S.Ct. at page 427:
>
> > '* * * We are dealing here with a question of personal liberty. A registrant who violates the Act commits a felony. A felon customarily suffers the loss of substantial rights. Sec. 11, being silent on the matter, leaves the question of available defenses in doubt. But we are loath to resolve those doubts against the accused.'
>
> "Where the record of selective service boards action in classifying a registrant is questionable, presumptions are resolved in favor of the registrant" (Citing numerous cases).

IV

THE PURPORTED ORDER TO REPORT FOR CIVILIAN WORK WAS IMPROPERLY ISSUED, AS THERE WAS NO EVIDENCE THAT THE WORK IN QUESTION WAS "CURRENTLY AVAILABLE"

In order to ascertain what work was "currently available" the appellant's local board wrote to the State Director on December 20, 1965, requesting that the State Director forward three types of "available, appropriate employment" (F 43). On December 22, 1965 the State Director responded, and advised the local board that three types of civilian work were "*available* for class I-O registrants *at the present time*" (F 34).

More than a month later, California Headquarters again wrote to the local board and specifically stated in part as follows:

> "*Unless* the file contains *current information* that such work is available, the State Director should be requested to obtain such information" (F 48).

In spite of this express instruction, the local board did not thereafter request or obtain any further information concerning the availability of civilian work. As a result, the purported "Order to Report for Civilian Work" dated April 22, 1966, was sent to the appellant some *four months after* the local board had been advised that such work was available.

The failure of the local board to ascertain if the work was currently available was a material procedural error which it should have corrected. As to this matter, as well as to the other errors described

in this brief, the express language of paragraph 7 of Local Board Memorandum No. 64 is appropriate:

> "7. Corrections of Procedural Errors. If a material error occurs at any point in the processing of a class I-O registrant for assignment to civilian work, that error should be corrected and the processing resumed from that point even though it requires a repetition of previous actions."[23]

CONCLUSION

Appellant's conviction should be reversed upon each and all of the following grounds:

1. There was in fact no valid "order" directing the appellant to report for civilian work in lieu of induction, as the local board, after receiving authorization from the National Director to so order appellant, did not meet, did not consider his classification, did not issue any order itself, and did not authorize its clerk to issue any such order.

2. The local board committed prejudicial error in failing to consider the new information submitted by the appellant when required to do so by the express direction of the local board.

3. The purported "order" to report for civilian work was not issued or signed by any person having authority to do so.

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[23]Local Board Memorandum No. 64, issued by the National Director of the Selective Service System, March 1, 1962, "Subject —Civilian Work in Lieu of Induction", paragraph 7.

4. There is no evidence appearing in the file that the work which appellant was purportedly ordered to perform was currently available when the "order" was issued.

Wherefore, the appellant prays that judgment of the District Court be reversed, and the cause remanded with direction to the trial court to enter a judgment of acquittal and discharge the appellant.

Dated, San Francisco, California,
December 12, 1967.

Respectfully submitted,
CLARK A. BARRETT,
Counsel for Appellant.

CERTIFICATE OF COUNSEL

I certify that, in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

CLARK A. BARRETT,
Counsel for Appellant.

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

ERNEST DOUGLAS BREDE, Appellant, v. UNITED STATES OF AMERICA, Appellee.	No. 21928

BRIEF OF THE APPELLEE

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BRIEF OF THE APPELLEE

JURISDICTION

This is a timely appeal, [1] by Appellant with retained counsel, from a judgment of conviction and sentence for violation of the Universal Military Training and Service Act [Title 50 Appendix U.S.C., §462(a)]. Jurisdiction in the District Court was predicated on Title 50 Appendix U.S.C., §462(a) and Title 18 U.S.C., §3231; jurisdiction on appeal is

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1/ A judgment of conviction and commitment was entered against the appellant, represented at all stages of the proceedings by retained counsel Clark A. Barrett, on May 23, 1967 (Record (hereinafter referred to as R.) Vol. I, p. 10) and a Notice of Appeal was filed the same day. (R., Vol. I, pp. 11-12; Fed. R. Crim. P. 37(a)(2).

invoked under Title 28 U.S.C., §1291 and §1294.

STATEMENT OF THE CASE

A. PROCEEDINGS BELOW:

The Federal Grand Jury at San Francisco, California, returned an indictment on January 18, 1967, in one count charging appellant with a violation of Title 50 Appendix U.S.C., §462(a) (R., Vol. I, pp. 1-2). Specifically, the indictment charged that "ERNEST DOUGLAS BREDE, defendant herein, on or about May 3, 1966, * * * did wilfully and knowingly fail and neglect to perform a duty required of him under and in the execution of the Universal Military Training and Service Act, as amended, and the rules and regulations and directions duly made pursuant thereto, in that he did fail and neglect to comply with an order of his local board to report to said board for instructions to proceed to the Los Angeles County Department of Charities, Los Angeles, California, (place of employment) to report for employment pursuant to such instructions, and to remain in such employment for twenty-four (24) consecutive months or until such time as released or transferred by proper authority."

The appellant pleaded not guilty, and following the execution of a jury waiver, the case was tried and concluded

on May 18, 1967, before the Hon. Jesse W. Curtis (R., Vol I, pp. 3,14). [2] Appellant was found guilty, and on May 23, 1967, was sentenced to the custody of the Attorney General for a period of eighteen months (R., Vol. I, p. 10). This appeal followed. Appellant is presently at large on his own recognizance pending appeal.

B. STATEMENT OF FACTS:

Appellant registered with the Selective Service System at Local Board 57, San Mateo, California, on June 4, 1964, four days after his eighteenth birthday (Exhibit, [3] p.2). As a practicing Jehovah's Witness, he was classified in class I-O on September 14, 1964, (Exhibit, p. 12), and a year later, he was ordered to report for an Armed Forces Physical Examination, (Exhibit, p. 26). He was found fully qualified

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2/ Judge Curtis ordinarily sits in the Central District of California at Los Angeles, but at the time this matter came on for trial, he was sitting as a visiting Judge in San Francisco.

3/ A certified and exemplified copy of appellant's Selective Service file was introduced into evidence as Plaintiff's Exhibit I (R., Vol. II, p. 11). That Exhibit was designated as part of the record on appeal (R., Vol. I, p. 15), and is before this Court as such, referred to hereinafter as Exhibit.

for induction (Exhibit, p. 38) and accordingly, processing toward a civilian work assignment in lieu of induction was commenced. Pursuant to Section 1660.20(a) of the Selective Service Regulations, 4/ appellant was furnished SSS Form No. 152, Special Report for Class I-O Registrants, which provided him with an opportunity to submit three types of approved civilian work which he felt qualified to perform and which he would offer to perform in lieu of induction (Exhibit, pp. 39-42). Appellant returned the form, but did not list nor offer to perform any work whatsoever. Accordingly, pursuant to Section 1660.20(b) of the Regulations, appellant's file was forwarded to the State Director of Selective Service on December 20, 1965, for the purpose of securing from him three types of available appropriate employment for submission to appellant (Exhibit, p. 43). The State Director responded two days later (Exhibit, p. 44), and on January 3, 1966, appellant was mailed a letter listing the three types of employment which the State Director had specified (Exhibit, p. 45). Appellant returned this letter to the local board indicating that he did not wish to perform any of the jobs listed, nor any other job (Exhibit, p. 45-46).

4/ The Selective Service Regulations are found in the Code of Federal Regulations, Part 1600, and are hereinafter referred to as the Regulations. The pertinent provisions of Sections 1660.20(a)-(d) are set forth on pages 7-9, infra.

Accordingly, pursuant to Section 1660.20(c) of the Regulations, a meeting was held on March 14, 1966, which was attended by the appellant, the members of his local board, and a representative of the State Director. The purpose of the meeting was to endeavor to reach an agreement as to the type of civilian work appellant was to perform, but no agreement was reached with appellant because he declined to perform all of the jobs which were offered (Exhibit, p. 52). At the conclusion of the meeting, therefore, the local board reviewed appellant's file, determined that work as an Institutional Helper at the Los Angeles County Department of Charities was available, was appropriate, and was to be performed by the appellant (Exhibit, pp. 12,52).

Thereafter, on March 15, 1966, appellant was mailed a Current Information Questionnaire which he returned on March 24, 1966. In that form he listed his present occupation as parking garage cashier (Exhibit, pp. 53-54).

Following receipt of the questionnaire, the then clerk of the local board, pursuant to the provisions of Section 1660.20(d) of the Regulations, dispatched a letter to the Director of Selective Service requesting authority for the ordering of appellant to perform the work the board had determined should be performed (Exhibit, p. 55). That authorization was received on April 20, 1966, (Exhibit, p. 56-57),

and accordingly, an Order to Report for Civilian Work was mailed to appellant on April 22, 1966 (Exhibit, p. 60), his number having been previously reached for induction (Exhibit, p. 59).[5] The order was signed by Barbara Jones, who was employed at that point by the Selective Service System as a clerk, assigned to appellant's local board (R., Vol. II, p. 17)[6]

Appellant received the order, but failed to comply with it, notifying the local board by letter that as a matter of conscience, he could not perform the work required (Exhibit, pp. 63-65,67). The instant criminal proceedings ensued.

5/ Section 1660.20(d) of the Regulations provides that an order to report for civilian work "shall not be issued prior to the time that the registrant would have been ordered to report for induction if he had not been classified in class I-O * * *." In general, registrants in class I-A and I-AO who have been found qualified for military service are ordered for induction in sequence on the basis of their dates of birth, with the oldest going first. 32 C.F.R. §1631.7. Class I-O registrants are part of the same sequence, but as their Selective Service numbers, which are assigned on the basis of their birth dates, are reached, they become immediately eligible for civilian work assignment rather than induction.

6/ On July 17, 1961, the local board passed a unanimous resolution authorizing clerical personnel to sign all forms and orders necessary to the completion of local board business (R., Vol. II, pp. 18-20, Exhibit 2, p. 2).

STATUTE AND REGULATION INVOLVED

Title 50 Appendix U.S.C. §462(a) provides in pertinent part as follows:

> * * * any person * * * who in any manner shall knowingly fail or neglect or refuse to perform any duty required of him under or in the execution of * * * [the Universal Military Training and Service Act] or rules, regulations, or directions made pursuant to * * * [the Universal Military Training and Service Act] shall, upon conviction in any district court of the United States of competent jurisdiction, be punished by imprisonment for not more than five years or a fine of not more than $10,000, or by both such fine and imprisonment * * *.

32 C.F.R. §1660.30 provides in pertinent part as follows:

> Any registrant who knowingly fails or neglects to obey an order from his local board to perform civilian work contributing to the maintenance of the national health, safety, or interest in lieu of induction shall be deemed to have knowingly failed or neglected to perform a duty required of him under * * * the Universal Military Training and Service Act, as amended * * *.

32 C.F.R. §1660.20 provides as follows:

> DETERMINATION OF TYPE OF CIVILIAN WORK TO BE PERFORMED AND ORDER BY THE LOCAL BOARD TO PERFORM SUCH WORK -
>
> (a) When a registrant in Class I-O has been found qualified for service in the Armed Forces after his armed forces physical examination or when such a registrant has failed to report for or to submit to armed forces physical examination, he shall, within ten days after a Statement of Acceptability (DD Form No. 62) has been mailed to him by the local board or within ten days after he has failed to report for or submit to armed forces physical examination, submit to the local board three types of civilian work contributing to the maintenance of the national health, safety, or interest as defined in section 1660.1, which

he is qualified to do and which he offers to perform in lieu of induction into the Armed Forces. If the local board deems any one of these types of work to be appropriate, it will order the registrant to perform such work, but such order shall not be issued prior to the time that the registrant would have been ordered to report for induction if he had not been classified in Class I-O, unless he has volunteered for such work.

(b) If the registrant fails to submit to the local types of work which he offers to perform, or if the local board finds that none of the types of work submitted by the registrant is appropriate, the local board shall submit to the registrant by letter three types of civilian work contributing to the maintenance of the national health, safety, or interest as defined in section 1660.1 which it deems appropriate for the registrant to perform in lieu of induction. The registrant, within ten days after such letter is mailed to him by the local board, shall file with the board a statement that he either offers to perform one of the types of work submitted by the board, or that he does not offer to perform any of such types of work. If the registrant offers to perform any one of the three types of work, he shall be ordered by the local board to perform such work in lieu of induction, but such order shall not be issued prior to the time that the registrant would have been ordered to report for induction if he had not been classified in Class I-O, unless he has volunteered for such work.

(c) If the local board and the registrant are unable to agree upon a type of civilian work which should be performed by the registrant in lieu of induction, the State Director of Selective Service for the State in which the local board is located, or the representative of such State Director, appointed by him for the purpose, shall meet with the local board and the registrant and offer his assistance in reaching an agreement. The local board shall mail to the registrant a notice of the time and place of this meeting at least 10 days before the date of the meeting. If agreement is reached at this meeting, the registrant shall be ordered by the local board to perform work in lieu of induction in accordance with such agreement, but such order shall not be issued prior to the time that the registrant would have been ordered to report for induction if he had not been classified in Class I-O, unless he has volunteered for such work.

(d) If, after the meeting referred to in paragraph (c) of this section, the local board and the registrant are still unable to agree upon a type of civilian work which should be performed by the registrant in lieu of induction, the local board, with the approval of the Director of Selective Service, shall order the registrant to report for civilian work contributing to the maintenance of the national health, safety, or interest as defined in section 1660.1 which it deems appropriate, but such order shall not be issued prior to the time that the registrant would have been ordered to report for induction if he had not been classified in Class I-O, unless he has volunteered for such work.

QUESTIONS PRESENTED

Whether the Order to Report for Civilian Work which appellant refused to comply with was properly issued, and whether the failure of appellant's local board to consider his Current Information Questionnaire, which merely reflected a change in his current employment from one menial job to another, amounted to a denial of due process sufficient to relieve appellant of the duty to comply with that order.

SUMMARY OF ARGUMENT

Because it was mandatory under Selective Service Regulations that appellant's order issue upon receipt of the approval of the Director of Selective Service, his number having already been reached for induction and there being nothing further requireing the local board's consideration, it was proper for Barbara Jones, a local board clerk authorized to sign all forms and orders necessary for the completion of local board business, to issue the order over her signature without further action by the local board.

ARGUMENT

THE ORDER TO REPORT FOR CIVILIAN WORK WAS PROPERLY ISSUED AND APPELLANT WAS NOT DENIED DUE PROCESS

It is appellant's position that the order to report for civilian work underlying this prosecution was improperly issued, and further, that he was denied both substantive and procedural due process, thereby relieving him of criminal responsibility for the offense charged in the indictment. His argument with respect to both assertions derives from the fact, uncontroverted by the Government, that following the meeting of March 14, 1966, [6/] between appellant, members of the local board, and a representative of the State Director of Selective Service, no further action was taken by the board itself prior to the preparation and mailing of the order in question by one Barbara Jones, who, as appellant stresses, was at that time a mere clerical employee of the board rather than the board Clerk.

As is apparent from the record before this Court, with particular reference to the Exhibit, following the March 14th meeting, appellant's processing toward a civilian work assignment

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6/ Appellant has specifically disclaimed any procedural or substantive error concerning local board action prior to March 14, 1966, and hence the Government's brief focuses, as does appellant's, on the pertinent actions of Selective Service from that date forward.

was completed entirely by clerical personnel. Pursuant to what was apparently customary procedure, a local board clerk mailed appellant a Current Information Questionnaire on March 15, 1966, which he returned nine days later bearing the notation that he was currently employed as a parking garage cashier. Following receipt of the questionnaire, the clerk, without placing appellant's file again before the local board, routinely forwarded a letter to the Director of Selective Service which requested authorization for the ordering of appellant to perform the work which the board had determined at the March meeting he should perform. 7/ That authorization was received in the local board office approximately one month later, and the order was promptly mailed, having been signed by Barbara Jones.

It is the Government's position that the procedure followed, as set forth above, was entirely proper. On March 14th, the local board fully completed all of the aspects

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7/ 32 C.F.R. §1660.20(d) requires that the Director of Selective Service approve the particular work assignment which the local board wants to make, and customarily that approval is sought by means of a form letter prepared by a clerk.

of appellant's processing which required any exercise of judgment or discretion, and there remained, accordingly, in order to complete the processing scheme established by §1660.20 of the Regulations, the mere formality of securing the Director's approval of the work they had determined appellant was to perform. As reflected in the Exhibit at page 52, the board on that date fully reviewed appellant's file together with the information he had provided at the meeting, which was to the effect that he would perform no work whatsoever, and based on such review, determined that he should be ordered to work at the Los Angeles County Department of Charities. Thereafter, nothing was added to appellant's file except the Current Information Questionnaire, and it is submitted that that did not require assessment by the local board. It merely reflected his current employment, which was essentially menial, and in view of appellant's assertion that he would not accept any assignment whatsoever from the local board, it is apparent that no useful purpose would have been served by bringing that

information to the board's attention.[8]

Thus, when the Director's approval was received, there was nothing to do except issue the order, and it is submitted that even though the Regulation[9] provides that "the local board, with the approval of the Director of Selective Service, shall order the registrant to report for civilian work * * *," there was nothing improper in the procedure Miss Jones followed. Appellant's number had already been reached for induction, and inasmuch as under those circumstances issuance of the order was mandatory,[10] it is apparent that the board should not

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8/ Appellant has asserted that the board's failure to consider the information submitted amounted to a denial of substantitive and procedural due process sufficient to relieve him of criminal responsibility for his failure to comply with their order, but it is clear that his argument in this regard is devoid of any merit. The board was certainly not required to consider essentially meaningless information, and in any event, it is apparent that appellant could not have been prejudiced thereby. And of course it is well settled that the failure of a local board to accord a registrant some procedure suggested in the Regulations which does not prejudice him will not then relieve the registrant of the duty to comply with the board's subsequent order. Yaich v. United States, 283 F.2d 613 (9th Cir. 1960).

9/ 32 C.F.R. §1660.20(d). (Emphasis supplied)

10/ 32 C.F.R. §1660.20(d) clearly requires the issuance, upon receipt of the Director's approval, of a civilian work order to any I-O registrant who at that point would already have been reached for induction had he been liable therefore.

have been required to meet again merely for the purpose of carrying out a procedural formality. 11/ And since all of the board's clerical personnel had been expressly authorized by the local board to sign all forms and orders necessary for completion of local board business, it follows that the order as issued was valid, 12/ and that accordingly, appellant must be held criminally responsible for his willful failure to comply with it.

11/ Certainly it was not incumbent upon the local board, as appellant suggests, to again determine that work was currently available in Los Angeles. They made such a determination on March 14th, and in any event, it should be absolutely clear that appellant is in no position to raise any question as to the availability of the employment he was directed to perform since he had no intention of performing it anyway.

12/ Appellant, with reference to §1604.59 of the Regulations, makes much of the fact that at the time she signed the order, Barbara Jones was not "the Clerk" of the local board, but rather, was merely one of their several clerical employees. That section provides "(o)fficial papers issued by a local board may be signed by the clerk of the local board if he is authorized to do so by resolution duly adopted by * * * the local board, "but it is submitted that it should not be construed to unduly limit the authority of the local board to delegate purely ministerial functions. And in any event, it is apparent that appellant could not have been prejudiced by so slight a deviation from the precise letter of the provision, particularly in view of the fact that he had no intention of reporting in any case. See Kent v. United States, 207 F.2d 234 (9th Cir. 1953); United States v. Lawson, 337 F.2d 800 (3rd Cir. 1964), cert. denied 380 U.S. 919 (1965)

CONCLUSION

For the foregoing reasons, the Government respectfully requests that the judgment below be affirmed.

Respectfully submitted,

CECIL F. POOLE
United States Attorney

By: PAUL G. SLOAN
Assistant United States Attorney

By: JERROLD M. LADAR
Assistant United States Attorney

CERTIFICATE

I certify that, in connection with the preparation of this brief, I have examined Rules 18, 19, and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

PAUL G. SLOAN
Assistant United States Attorney

No. 21928

BREDE v. UNITED STATES

CERTIFICATE OF MAILING

This is to certify that three copies of the foregoing Brief of the Appellee were mailed this date, certified mail - return receipt requested, to Clark A. Barrett, Esq., 315 Montgomery Street, San Francisco, California, Attorney for Appellant.

DATED: January 22, 1968.

PAUL G. SLOAN
Assistant United States Attorney

No. 21928

BREDE v. UNITED STATES

No. 21929

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

CHARLES SELIGSON, Trustee in Bankruptcy of IRA HAUPT & CO., a limited partnership, bankrupt,

Appellant,

vs.

LESTER WILLIAM ROTH,

Appellee.

APPELLEE'S BRIEF.

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Appellee.

APPELLEE'S BRIEF.

I.
PREFATORY STATEMENT.

This trial was bifurcated by stipulation to save the time of the court and enable the parties to present a clear, decisive issue of fact.

The single issue is: Did appellee have reasonable cause to believe that Ira Haupt & Co. (Haupt), and all of its general partners, were insolvent in December 1963 when appellee was paid his then current non-delinquent invoice in the sum of $7,503.95 for legal services rendered? The reasonableness of the fee is not in dispute.

The District Court below found that appellee, then a practicing attorney at law, representing a branch office in Beverly Hills, California, of a large national stock brokerage firm, Ira Haupt & Co., did not have reasonable cause to believe that this firm, and all of its general

partners, were insolvent in December, 1963, when that firm paid to appellee, upon presentation of his then current and non-delinquent invoice for legal services, the sum of $7,503.95 for attorney fees rendered and then being rendered by his law firm. So finding, the Court concluded that the payment was not a voidable preference and entered judgment accordingly in favor of appellee.

The law properly applicable to the facts, as found, is not in dispute.

II.
JURISDICTION.

(a) Jurisdiction in the trial court was conferred by the last sentence of Section 60(b) of the Acts of Congress Relating to Bankruptcy (11 U.S.C. 96). Like jurisdiction is conferred upon the District Court by Section 23 of the Same Act (11 U.S.C.).

(b) Jurisdiction over the instant appeal vests in the Court of Appeals by Section 24 of the said Bankruptcy Act (11 U.S.C. 47, sub (a)).

III.
SUMMARY OF APPELLEE'S ARGUMENT.

1. The trial court's finding is abundantly supported by the evidence and the reasonable inferences that can be drawn therefrom.

2. Appellant failed to offer any evidence to support the indispensable showing that appellee at the time of payment had reasonable cause to believe that the individual general partners of Haupt, a partnership, were also insolvent. No such evidence is in the record. Appellant's position therefore has no substance irrespec-

tive of the disposition of appellee's alleged (but disputed) state of reasonable cause to believe insolvency respecting the financial affairs of Haupt, the partnership firm.

IV.
CONCISE STATEMENT OF THE CASE.

A. The Pleadings and Pre-Trial Proceedings.

(1) Appellant filed a complaint under Section 60(b) of the Bankruptcy Act to set aside, as preferential, a payment made to appellee for attorney fees for services rendered by him to Haupt [C. T. pp. 2-4].

(2) Appellee answered, denying all of the material allegations insofar as they stated a claim to recover an allegedly preferential payment [C. T. pp. 6-7].

(3) The parties stipulated in writing [C. T. p. 56; R. T. p. 11] for a separate trial of the following issue (therein for purpose of brevity called "issue #1"):

> "Did the defendant Lester William Roth have reasonable cause to believe that Ira Haupt & Co., a limited partnership (and all of its general partners) were insolvent on or about December 23, 1963, and at the time when there was paid to said Lester William Roth the sum of $7,503.95 as and for attorney's fees?"

That stipulation further provides:

> "That if this Court decides the said issue #1 in favor of the defendant, that the Court shall then enter judgment in favor of the defendant and against the plaintiff";

and, further:

> "That if the Court shall determine said issue #1 in favor of the plaintiff and against the de-

fendant that then this cause shall proceed to trial, at a later date, on all of the other issues in this cause, counsel then being afforded reasonable time to prepare for the trial of all such other issues." [C. T. p. 56; R. T. p. 11].

(4) A series of 52 written interrogatories [C. T. pp. 47-53] were propounded by appellant to which appellee gave his sworn and detailed answers [C. T. pp. 59-86]. Appellant introduced these interrogatories and answers into evidence at the trial as part of his case against appellee [Pltf. Ex. 2, and R. T. p. 15, line 20, to p. 16, line 9].

B. The Evidence.

It is trite and bromidic to state that in an appeal involving a finding of fact, appellant must show that the finding is clearly erroneous to overcome it. Appellant seeks to meet this burden by taking certain portions of the evidence out of context, which according to appellant indicate that appellee must have known about the liquidation of Haupt; although conceding liquidation does not mean insolvency (p. 16, A.O.B.), and then making argumentative deductions therefrom. Even on this limited ground the law is settled that when evidence is susceptible to an inference from which different conclusions can be reached, the conclusions of the District Court should be accepted (F.R.C.P. 52 (a) and General Order 47, and the decisions of this court in *Security v. Quittner,* 9 Cir., 176 F. 2d 997 and *Hoppe v. Rittenhouse,* 9 Cir., 279 F. 2d 3).

For the convenience of this court, however, we succinctly outline the evidentiary background upon which

the quoted finding is based, even though the burden is upon appellant to show that there is no substantial evidence to sustain the finding. The facts are:

(1) Appellee was practicing law in 1963 in Beverly Hills, California. Admitted to the bar in 1916, he practiced continuously, except for service in the United States Marine Corps in 1917-1918, and service as a Judge of the Superior Court, Los Angeles County, California, from 1931 to 1936. In late November, 1963 he was appointed to the District Court of Appeal and began to wind up his pending law work [see answers to written interrogatories, Pltf. Ex. 2; C. T. p. 60, lines 4-7; and p. 59, lines 28-29].

(2) The circumstances under which he became local counsel for the Beverly Hills Branch Office of Haupt were: In the Spring of 1961, Roth was asked by Lawrence Block and Co. to assist in negotiating a lease for a new building to be constructed in Beverly Hills by Lawrence Block & Co. for occupancy by Haupt as Lessee. The lease generally provided that Haupt pay net rental of $60,000.00 per year and that tenant would equip its new Beverly Hills branch with fixtures costing some $200,000.00 [See Ex. 2, C. T. p. 73, line 23, to p. 74, line 7]. Haupt apparently was highly solvent, and fully responsible therefor. During these negotiations appellee met Joseph Kaufman, general counsel in New York for Haupt, who told Roth that they might need counsel in Beverly Hills, and that he expected to contact Roth later [R. T. p. 31, lines 2-6].

In the Spring of 1963, Roth received a telephone call from Joseph Kaufman [R. T. p. 31, line 6 *et seq.*], inquiring if he (Roth) was interested in becoming

local counsel for Haupt. In Roth's words, the following transpired:

> "At that time he told me that the company was thinking of changing their local representation and asked me if I was interested, and I said yes. He asked me what retainer I wanted and I stated it was a little hard to fix a retainer for I did not know exactly what was entailed. I suggested instead that I do their work beginning with the Spring of 1963 to December of that year, and that then I would render a bill to them for the work I was performing. I told them that I would discuss my bill with them, and that it would be reasonable. I went to work on that basis. Very early in December, 1963, as I recall it, I was advised that I was to be appointed by the Governor to the District Court of Appeal. I then began winding up my work and spoke with the manager of the local company, advising him that the end of the year was approaching, and that I was going on to the Bench, and that I would be sending a bill for services which I was rendering, and that I felt the amount of $7,503.95 to be reasonable. Mr. Blattner agreed, asked that I send the bill in duplicate as indicated hereinbefore, and I did so, and I was promptly paid without challenge of any kind or without any request for extension; all as hereinbefore indicated." [C. T. p. 73, lines 3-22, incl.].

(3) Roth outlined in detail the work he and his law staff performed. No part of that work involved the financial condition of Haupt. None of the litigation brought against Haupt and handled by Roth challenged

even remotely the financial stability of Haupt. None of the suits handled involved any attachments against Haupt [C. T. p. 62, lines 6-8]. None of the suits sought the return of property from Haupt or damages for its failure to return any property [C. T. p. 62, lines 10-12]. The financial problems of Haupt were never discussed by Roth with anyone, nor was he ever consulted with respect thereto [C. T. p. 66, lines 25-28].

Counsel for appellant inquired of Roth in detail as to each particular piece of litigation he handled [C. T. p. 62, line 16, to p. 64, line 15].

Roth was then examined as to each additional item of work listed upon his itemized statement [Exs. 3 and 4]. He testified in detail as to those services, as well [C. T. p. 65, line 22, to p. 66, line 23].

Appellant put the following interrogatories to Roth [C. T. p. 62, lines 6-12]:

Interrogatory No. 18 [Ex. 2]:

> "Q. Did any of the suits which you handled for Ira Haupt & Co. involve attachments? A. No."

Interrogatory No. 19:

> "Q. Did any of the suits seek the return of property or damages for failure to return property. A. No."

Roth testified that he had no conversations in 1963 with anyone in which the financial problems of Haupt were discussed [C. T. p. 70, lines 8-20].

Roth was asked the following question:

> "Q. Did you believe that it was in any difficulty when you had this conversation or presented

your bill? A. I didn't even remotely suspect that it was in financial difficulty." [R. T. p. 40, lines 12-17].

And he was likewise asked [R. T. p. 41, lines 8-12]:

"Q. Did you know anything of your own knowledge concerning that problem with a client of Haupt & Co., this Allied Crude Vegetable Oil Company, of your own knowledge did you do any work in that matter? A. Nothing whatsoever."

Respecting one of the litigated matters, that of *Goorman v. Haupt,* pending and partially, but not finanally, completed when Roth went on the Bench, James P. Del Guercio, a member of Roth's law firm, testified that he completed the Goorman trial in January, 1964 [R. T. p. 55, lines 23-25], shortly after Roth's elevation; won the action for Haupt [R. T. p. 58, lines 13-15], billed Haupt and was paid by Haupt in the regular course of business [R. T. p. 57, line 22, to p. 58, line 6 and Deft. Ex. C]. (This latter payment was made many weeks after the disputed payment of $7,503.95 in December, 1963, which is here involved).

Del Guercio further testified as to a number of other legal matters the office continued to handle for Haupt in the regular course of business long after the disputed payment [R. T. p. 56, line 1, to p. 62, line 5; and see Ex. 1 for continuing law work through February, 1964]. Del Guercio's records showed prompt payment by Haupt for this continuing work after December, 1963, and through March, 1964 [Exs. C and D].

Roth was examined concerning his acquaintance with John Mahoney, liquidator. The record shows the fol-

lowing interrogatories by appellant and answers by appellee Roth [C. T. p. 60, line 23, to p. 61, line 18]:

"INTERROGATORY NO. 9:

"Q. When, if at all, did you first meet James Mahoney? A. Never.

"INTERROGATORY NO. 10:

"Q. Was he at the time you met him acting in the capacity of liquidator for Ira Haupt & Co.? A. I never met or talked to Mr. Mahoney, and I do not know his capacity.

"INTERROGATORY NO. 11:

Q. Did he inform you how long he had been acting as liquidator for Ira Haupt & Co.? A. No.

"INTERROGATORY NO. 12:

"Q. Did he inform you of the reasons for his appointment? A. No."

"INTERROGATORY NO. 13:

"Q. Did he give you any information as to the financial condition of Ira Haupt & Co.? A. No."

"INTERROGATORY NO. 14:

"Q. Did you know that James Mahoney was the Chief Examiner for the New York Stock Exchange? A. No."

"INTERROGATORY NO. 15:

"Q. Did he show or disclose to you any correspondence or documentary evidence pertaining to the financial affairs of the business? A. No."

Roth was examined at the trial concerning the check he received in payment for his statement. The check is the check of Haupt. It is not the check of the liquidator, nor is it signed by or for Haupt by James Ma-

honey [See Ex. 5; R. T. p. 20]. Asked to examine the endorsement on the back of the check, Roth testified that the endorsement was a stamped endorsement placed there by his secretary, who deposited it regularly, and they he hadn't actually ever taken a good look at the check until he was asked at the trial to examine it [R. T. p. 21, lines 15-20]. The check, both front and back, shows its normal deposit and payment, without protest or dishonor and upon presentation [Ex. 5].

Roth was pressed as to his reason for sending a duplicate of his invoice [Exs. 3-4] for his services to James Mahoney, Liquidator. He testified [R. T. p. 34, lines 13-21]:

> "Joseph Kaufman, as I think I testified earlier, asked me to discuss the bill with Mr. Blattner who was their local manager and to obtain his approval of the bill and I did have a conversation with Mr. Blattner, he came to my office, I didn't go to the Haupt office in Beverly Hills, but he came to my office and we had a conversation, and he made the suggestion that I send the statement in duplicate with a copy to, or maybe the original to Mr. Mahoney, the liquidator."

Roth was then examined as to whether or not he had ever read, in 1963, a number of newspaper reports [Exs. 8-A to 8-L], and Roth answered in the negative. These newspaper reports deal with the affairs of Haupt and one of its clients, the Allied Crude Vegetable Oil Co. It appears therefrom that Allied, a customer of Haupt, had become financially involved through the issuance by the American Express Warehouse Company of warehouse receipts purporting to represent salad oil stored in warehouse by the said Allied Crude Vege-

table Oil Co. That commodity had not, in fact, been thus stored in warehouse, albeit, Allied had succeeded in causing American Express Warehouse Co. to issue warehouse receipts therefor which, in turn, were then dealt in on the commodity exchanges by Haupt and other brokers (Williston & Beane). [See Exs. 8-A to 8-L.] Roth said further that he thought (in December, 1963) that because of the difficulties they (Haupt) had with one client (Allied Crude Vegetable Oil Co.) that they had violated some regulation of the New York Stock Exchange and that they were liquidating the business for the purpose of satisfying everybody that it was a solvent concern [[R. T. p. 40, line 18, to p. 41, line 6].

Examined further, Roth testified as follows [R. T. p. 41, lines 8-24]:

> "Q. Did you know anything of your own knowledge concerning that problem with a client of Haupt & Co., this Allied Crude Vegetable Company? Of your own knowledge did you do any work in that matter? A. Nothing whatsoever.
>
> Q. In any litigation that you handled in Los Angeles did any problem arise asserting the alleged insolvency of Ira Haupt & Co.? A. No.
>
> Q. In any matter that you handled for Ira Haupt & Co. was there the assertion that the firm was insolvent? A. No.
>
> Q. Did you have to file any suit or make any threats or demands for payment of this bill? A. None whatsoever. As a matter of fact the bill was paid with surprising promptness."

While Mr. Del Guercio was on the stand he was interrogated about a document found in his file [Ex. 7]

dated November 20, 1963, reading, in applicable part, as follows:

> "Ira Haupt & Co. is solvent and is in an excellent financial position. We anticipate that the suspension by the New York Stock Exchange and the American Stock Exchange is temporary. The Chicago Board of Trade has already removed its earlier suspension."

This statement was issued by a general partner of Haupt, one Kamerman.

Mr. Del Guercio was further examined respecting a letter [Ex. 6] and a telegram dated December 4, 1963 [Ex. A] which he had sent on December 5, 1963 on behalf of the City National Bank for which the Roth Law Office was counsel. A telegram [Ex. A] confirms a concurrent telephone conversation and the telegram reads in part as follows:

> "Confirming our phone conversation of this date you have advised that the present legal status of Ira Haupt & Co. is that 'it is in business', that there are 'no restraining orders or injunctions affecting any activity of Ira Haupt offices.' "

The addressee of that telegram, the law firm of Milbank, Tweed, Hadley & McClory of New York, replied to Exhibit A and Exhibit 6 by letter dated December 7, 1963 [Ex. B]. By that letter, Exhibit B, Mr. Del Guercio was advised that Haupt was "in the process of orderly liquidation, that it is not conducting business in the usual sense, but it remains a business entity while it is closing out its affairs." Exhibit B contains the further statement to Del Guercio: "We know of no restraining orders or injunctions relating to any of Ira Haupt's offices." [Ex. B].

Through Mr. Del Guercio there was then introduced the correspondence with Haupt concerning the continuing legal matters handled by the Roth firm weeks after the payment in December, 1963 of the $7,503.95 [See Ex. D]; and Mr. Del Guercio testified that as late as March 2, 1965, he did law work for Haupt [R. T. p. 56, lines 1-7]; and, that in January, 1964, he completed the then pending Goorman trial [R. T. p. 55, lines 23-25]; worked on the Willebrand matter [R. T. p. 57, lines 1-5]; billed Haupt regularly after December, 1963, and was paid by Haupt [R. T. p. 57, line 7, to p. 58, line 4]. These billings to Haupt, and the admitted payments by it after December, 1963, are now in evidence as Exhibit C.

On the issue of Roth's alleged knowledge in 1963 of the financial affairs of the individual partners of Haupt, Roth testified [R. T. p. 36, line 25, to p. 38, line 16]:

> "Q. Did you ever see a financial statement of the assets and liabilities of the 16 individual general partners of Ira Haupt & Co.?[1] A. I never did.
>
> Q. At any time did you have any cause to suspect that any of the individual general partners of Ira Haupt & Co. were insolvent? A. On the contrary, I knew most of them, not most of them, but at least three of them, to be very wealthy men.
>
> Mr. Katz: Mr. Utley, we can stipulate, can we not, that at least in 1963 there were 16 different general partners of Ira Haupt & Co.?[1]

---

[1]We are told by the case of *In re Haupt & Co.*, 234 F. Supp., at page 158: "Haupt was a limited partnership with sixteen general partners and thirteen limited partners."

Mr. Utley: There were quite a few. I wouldn't be certain as to the number.

Mr. Katz: But there was a substantial number?

Mr. Utley: Put your question.

Q. Were there a number of general partners of Ira Haupt whom you had never even met? A. I would say I haven't met most of them.

Q. Did you have any knowledge as to the assets and liabilities of these general partners in either November or December of 1963? A. No, I did not.

The Court: Do you know who the managing partner was?

The Witness: No."

As against this record, appellant specifically cites testimony of appellee (p. 8, lines 11-16; p. 9, lines 1-9 of his brief) suggesting that appellee indicated reasonable cause to believe insolvency by his testimony that because of a violation by Haupt of a rule of the New York Stock Exchange, Haupt was liquidating to satisfy everyone that it "was a solvent concern". In an earlier statement made by appellee in its opening brief, page 6, line 2, the fallacy of appellant's suggestion is shown by his admission that the bill was actually paid by Haupt, and appellant's evidence showing orderly liquidation.

V.

ARGUMENT ON THE LAW.

1. The General Principles Involved.

(a) There is, of course, a presumption that a payment made by a debtor to his creditor is valid, and a concomitant presumption of the solvency of the debtor.

No invidious inference arises from the fact of such payment, even where made within the four month period described in Section 60(b) of the Bankruptcy Act (*Marshall v. Nevins,* 9 Cir., 242 Fed. 476; 3 Collier on Bankruptcy, 14th Edition, p. 1127). When a debtor pays, and a creditor receives, the amount of a just debt, the natural presumptions are in favor of the good faith of the transaction (*Sabin v. Western,* 9 Cir., 2 F. 2d 130, 131).

(b) The Trustee has the unmistakable burden of proving by a fair preponderance of all the evidence every essential controverted element of an alleged voidable preference (*Keenan v. Shields,* 9 Cir., 241 F. 2d 486), including as a part of that burden that the creditor, at the time of payment (and not months or years later), had reasonable cause then to believe the debtor to be insolvent (*Valley National v. Westover,* 9 Cir., 112 F. 2d 61; 3 Collier 14th Edition, pp. 1123-1127 and case cited; and see *Hoppe v. Rittenhouse,* 279 F. 2d 3).

2. The Trial Court's Determination That There Was No Reasonable Cause to Believe Insolvency Is a Finding of Fact and Not a Conclusion of Law as Asserted by Appellant.

(a) Appellant argues that this Court should disregard the finding of the District Court and make a new finding favorable to appellant. He asks this Court not only to disregard F.R.C.P. 52(a) and General Order 47 in Bankruptcy, but additionally, to disregard, or to reverse a long list of decisions by this Court, including: *First National Bank v. Quittner,* 176 F. 2d 997 (9 Cir.); *Hoppe v. Rittenhouse,* 279 F. 2d 3 (9 Cir.); *Hempy v. Sims,* 246 F. 2d 420 (9 Cir.); *Sabin v. Western,* 2 F. 2d 130; *Cedar Camp Materials v. Bumb,* 344

F. 2d 256 (9 Cir.); and see the host of cases collated in the Treatise, 3 Collier on Bankruptcy, ¶ 60.54, p. 1002, p. 1003 (14th Ed.).

Appellant, realizing that a finding may not be thus disregarded unless bereft of all evidentiary support, then argues secondarily that the District Court's critical finding is indeed a conclusion of law.

The cases are to the contrary. As recently as *Cedar Camp v. Bumb,* 344 F. 2d 256 (9 Cir.), this Court expressly said that the existence of reasonable cause to believe insolvency is an issue of fact. Under General Order 47 this Court must accept a finding on this issue "unless clearly erroneous". *Norberg v. Ryan* (9 Cir.), 193 F. 2d 407, holds that a Trial Court's determination of the issue of reasonable cause to believe insolvency is a finding of fact which is protected by Rule 52(a). The cited cases take their texts from *Security First National Bank v. Quittner,* 176 F. 2d 997 (9 Cir.), at pages 998-999, where the same assertion here made by appellant is discussed, carefully considered, and rejected. This Court said:

> "And if the evidence here be not such as to require us to find the trial court's findings clearly erroneous, we must accept that Court's conclusions. Federal Rule of Civil Procedure rule 52(a), 28 U.S.C.A."

Other pertinent language at pages 998-999 is:

> "In considering the evidence presented, the Court below was confronted with a delicate task. Not much help was available from decided cases which, while very numerous, present widely varying conditions and facts. The creditor cannot be charged

with knowledge, or its equivalent, where a mere ground for suspicion exists. *Grant v. National Bank,* 97 U.S. 80; 24 L. Ed. 971. *He should not be required to make inquiries which could only appear necessary after he had the hindsight of later events.* Due regard must be had for what is common business practice—the standards of the 'prudent business person' should not be unrealistic. *Harrison v. Merchants,* 8 Cir., 124 F.(2) 87."

3. Appellant Misstates the Rule of Law Respecting the Effect to Be Given on Appeal to Facts Below Which Are Essentially Undisputed.

The correct rule in this Circuit is articulated in *Security, supra,* and in *Hoppe v. Rittenhouse,* 276 F. 2d 3, wherein this Court said at page 9:

> "The rule applied in Fazio [*Costello v. Fazio,* 256 F(2) 908] is pertinent where the primary facts can fairly be said to admit of but one reasonable conclusion, and *yet this rule does not change the equally settled rule that where the basic and undisputed facts are fairly susceptible of diverse inferences requiring different conclusions, the determination made by the trier of fact is conclusive on review unless that finding is 'clearly erroneous'.*"

There is an interesting comment on the aforementioned *Fazio* rule and its qualification by the later *Hoppe* case, which is found in *Olympic v. Thyret,* 337 F. 2d at page 68. That comment illumines clearly appellant's error here.

Certainly, and at a minimum, the facts in the case at bar are "fairly susceptible to diverse inferences" and

thus, and contrary to appellant's view, the critical determination by the District Court is one of fact protected by Rule 52(a).

And see also:

Swanson v. Wylie, 237 F. 2d 16, 9 Cir. and cases collated in 4 Remington (Henderson) 334.

4. The Evidence Supports the Trial Court's Finding.

The record amply shows all the following:

(i) The obligation for attorney's fees was paid exactly in accordance with its terms. Appellee's agreement was to act as local counsel for Haupt in Beverly Hills, and to bill it towards the end of the year. Near the end of that year, after he was told by the Governor in late November of his appointment, and a conversation with Haupt's general counsel, Roth sent a bill [C. T. p. 73, lines 3-22].

(ii) The obligation involved was not delinquent; no demand or action of any kind was required to enforce its payment [R. T. p. 41, lines 21-24].

(iii) The check given in payment was the check of the debtor, not the liquidator, was deposited by the payee in the ordinary course of business, and was paid on December 23, 1963, upon its presentation, without protest of any kind [R. T. p. 21, lines 9-20].

(iv) No litigation or other matter which Roth handled for Haupt involved any attachment proceeding against Haupt, nor any effort to recover

property from it, nor any claim that Haupt was insolvent [C. T. p. 62, lines 6-12].[2]

(v) Roth's law staff continued to do work for Haupt, continued to extend credit to Haupt in the form of its labors, and was paid after December 23, 1963 in the normal course of business by Haupt [R. T. p. 55, line 18, to p. 60, line 20].

(vi) Shortly before the challenged payment, in a written statement, the managing partner of Haupt advised the Roth office that Haupt was solvent and while one of its customers, Allied, was in difficulty, Haupt was in excellent financial condition [Ex. 7].[3]

(vii) Shortly before the payment the Roth office was advised telephonically that the legal status of Haupt was that it was in "business" and that there were no restraining orders or injunctions affecting any activity of the Ira Haupt offices [Ex. A].

(viii) Roth never met or talked to James Mahoney, and was never advised respecting his powers

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[2]These facts (i), (ii), (iii) and (iv) are the exact opposite of the facts found in *Security v. Quittner*. These opposite facts in *Security v. Quittner* were enough to support the finding there of reasonable cause to believe. The opposite facts here are enough, by parity of reasoning, to support the opposite finding here.

[3]Appellant misconceives completely the import of this Ex. 7. While it is true that the bankrupt's statement concerning assets and liabilities at a particular time is not conclusive, it is admissible evidence on the issue of the transferee's knowledge or lack of reasonable cause to believe. As is said in the treatise Remington on Bankruptcy, Vol. 4 (Henderson) at p. 278: "The bankrupt's testimony as to his assets and liabilities at any particular time inquired of, is however testimony to facts, and is not to be rejected because uncorroborated."

or duties, nor did the latter give Roth any information respecting the financial condition of Haupt [C. T. p. 60, line 23, to p. 61, line 18].

(ix) Roth testified upon his oath concerning his belief respecting Haupt's financial condition when his bill was presented, and he swore that he didn't even remotely suspect that it was in financial difficulty [R. T. p. 40, lines 13-17]; and "that he knew nothing whatever respecting Haupt's problems with its customer, Allied Crude Vegetable Oil Co." [R. T. p. 41, lines 8-12].

A finding that there was no reasonable cause to believe insolvency was upheld on appeal against similar attacks on evidence less full and convincing than the record at bench, by virtually everyone of our circuit courts. See:

Hempy v. Sims, 9 Cir., 246 F. 2d 420;

Lang v. Houston, 5 Cir., 215 F. 2d 118, particularly at pp. 120-122;

Rogers v. Reconstruction, 6 Cir., 232 F. 2d 930;

McDougal v. Central, 10 Cir., 110 F. 2d 939;

Salter v. Guaranty, 1 Cir., 237 F. 2d 446;

Matter of Machlin, 7 Cir., 4 F. 2d 227; particularly at p. 228.

See also:

Warner v. Citizens Bank, 19 F. 2d 947.

It is settled that the evidence in this case must be weighed by the following rules:

(a) "The trier of the facts, in a suit to avoid a bankruptcy preference, is not required to evaluate the circumstances and incidents involved on the

mere basis of the subsequent failure but may properly appraise the character, purpose and reasonable apparent effect of the transaction at the time that it occurred." *Bostian v. Lavich,* 8 Cir., 134 F. 2d 284.

(b) "In considering the evidence presented, the Court below was confronted with a delicate task. Not much help was available from decided cases which, while very numerous, present widely varying conditions and facts. The creditor cannot be charged with knowledge, or its equivalent, where a mere ground for suspicion exists. *Grant v. National,* 97 U.S. 80. He should not be required to make inquiries which could only appear necessary after he has the hindsight of later events. Due regard must be had for what is common business practice—the standards of the 'prudent business person' should not be unrealistic."

Security v. Quittner, 9 Cir., 176 F. 2d 997.

In spite of the fact that Judge Hall had the witness before him, appellant asks this court to hold the finding of the trier of fact clearly erroneous and to reject the guidelines laid down by the above-cited cases because, says appellant,

(a) Appellee knew there was a liquidator for Haupt in December 1963; and, because (b) appellee should have read a series of articles (but didn't) appearing in the press. Upon these assumptions, he asserts, appellee was charged with the duty of investigation and charged with the consequent knowledge of what appellant now thinks such investigation, if made, might then have revealed. Therefore, appellant argues, this court can

make a finding different from that made by the trial judge. To these assertions and their purported legal effect, we now address ourselves.

5. **Although Appellant Argues That the Knowledge of a Liquidator Should Have Put Appellee on Notice, Appellant's Own Definition of Liquidation Shows, and the Law Is, That Liquidation Cannot Be Equated With Insolvency.**

Appellant Was Not Legally Chargeable, Particularly Under the Circumstances Detailed in the Record, With Notice or With the Obligation to Proceed With Further or Any Investigation.

(a) Countless solvent corporations go into liquidation, voluntarily or involuntarily. Indeed, if appellant were correct, invidious inference would necessarily flow from the liquidation of every firm, however affluent it might be. By appellant's standard, no solvent firm ought ever to go into liquidation, else those who have or continue to deal with it during liquidation and receive payment in due course, must be found to have acted at their peril.

The word "liquidator" is not a synonym for the noun, "receiver". Appellant so concedes (*Cf.* Webster's New International Dictionary, 2nd Edition, Unabridged, where, according to appellant's own brief we find [p. 16, lines 13-17]: "Liquidator—one who liquidates; esp. a person appointed to conduct the winding up of a company. In English law *the liquidator is distinct from the receiver.*") (Italics ours).

Liquidation, according to 54 Corpus Juris Secundum at page 565, "does *not* carry with it the connotation of

insolvency, or that assets are insufficient to pay debts. *Thus a business that is in the process of liquidation may or may not be insolvent and is not presumptively insolvent.*" (Italics ours).

In *Henry v. Alexander,* 194 S.E. 649, the court, dealing with the specific claim that the designation of one as a liquidator for a bank necessarily carried with it the presumption of law that the bank was insolvent when the liquidator was appointed, said:

> "In our opinion these allegations [i.e. that plaintiff was appointed Liquidator of the Commercial Bank of Clinton] *cannot* be considered as making an averment of insolvency; nor does the complaint, viewed in the most liberal light, supply the needed statement of fact. Even solvent banks may be liquidated, and it may be that banks which are considered insolvent may prove to be solvent when liquidated. . . . A business in process of liquidation whether it be that of an individual, a partnership or a banking corporation, may or may not be insolvent. *The term does not necessarily carry with it the connotation of insolvency; nor specifically that the assets of a bank* in process of liquidation are insufficient to pay its debts." (Italics ours).

It should be borne in mind that Roth presented his bill in a most natural manner at the time he was winding up his own work at his law office.

Roth never talked to this liquidator. He never met him. He never learned who had appointed him; or what his duties were [R. T. p. 60, line 23, to p. 61, line 18]. But, says appellant, he should have met him; he should have learned what his duties were. The

record shows that if he had, he would have been told, as Del Guercio was, that Haupt was solvent. Appellant argues, too, that since Roth was representing Haupt's Beverly Hills office, he should have known, as a matter of law, that when Mahoney was appointed in New York that the firm itself was in financial difficulty.

Not so. In today's complex world it is common business practice by local counsel to act for hundreds of national firms without being privy to their national financial situations, or their fiscal affairs. Large national insurance companies engage local counsel to handle their local litigation and local problems. Railroad, large chain stores, etc., etc., use local counsel for their local problems. Can anyone seriously assert that such local counsel must therefore be privy to the nature of their national client's financial affairs? They *might* know. But it does not follow from their localized status that local counsel *do* in fact know, or *should in fact* know or have reasonable cause to believe anything about such national financial condition, especially where, as here, no matter which local counsel had handled, or was handling in the course of the discharge of his services, questioned or even remotely involved the financial condition or solvency of the national client.

We can imagine no more "unrealistic" standard than the one appellant asks this Court to apply when it argues that local counsel, acting for a national firm in liquidation must (as a matter of law and independent of the true facts), be deemed to have reasonable cause to believe insolvency, or that he must, as a matter of law, be deemed to have acted in violation of the standard norms of a prudent business person if without exhaustive investigation he accepts payment in the

regular course of his business of a bill paid by the debtor promptly upon its presentation.

Even if there be some, like appellant, who disagree with these views, still the determination by the District Court here should be upheld by virtue of the rule of this Court respecting different inferences from given facts, and the further rule: "Due regard must be had for what is common business practice—the standards of the 'prudent business person' should not be *unrealistic.*" *Security v. Quittner, supra; Harrison v. Merchants,* 8 Cir., 124 F. 2d 871.

Nor is the case any different simply because Roth said: "I didn't even think, as I tried to reconstruct the picture, that they were voluntarily liquidating the business. I thought that because of the difficulties they had had with one client that they had violated some regulation of the New York Stock Exchange and that they were liquidating the business for the purpose of satisfying everybody that it was a solvent firm." [R. T. p. 40, line 24, to p. 41, line 26.] Appellant makes much of this declaration, even going so far as to suggest that this alone establishes that the determination by the trial court was "clearly erroneous."

Not so. In the first place, this statement is to be read in the light of the following further answers given by Roth on the same subject: At R. T. 47, line 17, counsel for appellant put the following question to appellee (after the latter gave the answer quoted in appellant's brief at p. 9, line 3 thereof):

By Mr. Utley:

"Q. Judge, you spoke of your thought that Ira Haupt & Co. had some difficulty with a client. What client were you referring to? A. By name

> I have heard it in the court room—I can't repeat it now—but it is that client. I had a general understanding that some client had either defrauded them or that they had violated by reason of negligence or something or other the rules of the Stock Exchange and for that reason a liquidator had been appointed, but who appointed the liquidator, when he was appointed, what his functions were, I had no idea then and I have no idea now."

And at R. T. p. 41, line 8, the following was asked of, and answered by, appellee:

> "Q. Did you know anything of your own knowledge concerning that problem with a client of Haupt & Co. this Allied Crude Vegetable Oil Company. Of your own knowledge did you do any work in that matter? A. Nothing whatever."

It is too late in these hectic times to suggest that there is *necessarily* any connection between a large business firm's difficulty either with a client, or with a regulatory agency (public or private) and a reasonable cause to believe in the insolvency of that firm at the time of such involvement. Frequently solvent firms are charged and found guilty of violating regulations of the National Labor Board, the Federal Power Commission, the I.C.C., the Wage and Hour Divisions, the various regulations of Stock Exchanges, etc., etc. Wide publicity often attends such findings.

To suggest that a reasonable person could not, under any circumstances, fail to believe that insolvency existed (and that is the test) when advised of such firm's involvement in such a regulatory violation, is to de-

mand a standard inapplicable to the world, as it exists today. This is the *unrealistic* standard decried by this Court in *Security v. Quittner, supra.*

Appellant urges upon this Court the proposition that the receipt of some information respecting the alleged infraction of a regulation must in all events be deemed the receipt of facts carving out reasonable cause to believe insolvency to exist, and thereby generating the need to make further inquiry, and, in turn, resulting in the penalization of a payee for not making such further inquiry. This proposition is at war with the law and with sound common sense. It would establish for lawyers representing local branch offices of national firms a duty to investigate every rumor coming their way concerning their nationally based client's conduct, even if the rumor involved the client's difficulty with a customer, or the claim that the client had violated some regulatory agency's regulations, or was in liquidation. The lesson of *Grant v. First National,* 97 U.S. 80, is here apposite:

> "It is not enough that a creditor has some cause to suspect the insolvency of his debtor, *but he must have such a knowledge of facts* as to induce a reasonable belief of his debtor's insolvency, in order to invalidate a security taken for his debt." (Italics ours).

Absent such knowledge, no duty to investigate even arises.

And there was no duty in any event to investigate further, in the context of this case.

It is to be remembered that the District Court had the following evidence before it in the form of Exhibit A (that Exhibit A is a telegram sent by James Del

Guercio, a member of appellee's law staff, who was then acting on behalf of yet another client, City National Bank in Beverly Hills, whom the same law office represented; the telegram confirms his telephone conversation on December 5, 1963 with New York counsel for the liquidator).

> "This office is general counsel for City National Bank of Beverly Hills with which bank Ira Haupt & Co. has conducted its banking transactions. Confirming our phone conversation of this date you have advised that the present legal status of Ira Haupt & Co. is that it is in business, that there are no restraining orders or injunctions affecting any activity of Ira Haupt offices."

Nor was this conversation, as reflected in Exhibit A, changed significantly by the letter from New York counsel, Exhibit B, wherein the Roth office was advised: "The firm of Ira Haupt is in the process of orderly liquidation; it is not conducting business as a broker-dealer in the usual sense, but it remains a business entity while it is closing out of its affairs . . ."

Appellant, however, argues that Roth is charged with knowledge of the newspaper reports [Ex. 8-A to L] which he did not read. If read, appellant's case would be no better. For a reading of those reports would reveal a myriad of assertion and cross-assertions such as:

> "Ira Haupt is solvent and in excellent financial condition; Latest Statement shows net worth of $8,343,820 and total assets of $89,260,000.00; Haupt net worth 8.3 million and assets of 89.2 million; Haupt seeking to recover its losses in Court Action; Haupt added 5 new partners [naming them], etc." [See Ex. 8-A-L].

We do not deal here with a "Ponzi" type case (*Lowell v. Brown,* 280 Fed. 193) reversed on other grounds *sub. nom. Cunningham v. Brown,* 265 U.S. 1. Here Roth, if he had in fact read these articles, would have read different rumors about a variety of cross-claims—viz. that while Haupt had been suspended on one day from the New York Stock Exchange, it was reinstated on the following day by the Chicago Stock Exchange; and that Haupt had a net worth at the very time involved of more than eight million dollars [See Exs. 8-A to L].

Helpful here in evaluating the District Court's determination of Roth's conduct is the principle: "He should not be required to make inquiries which could only appear necessary after he has the hindsight of later events." (*Security v. Quittner, supra.*) What Judge Fee said for this Court in *Engleman v. Bengel,* 191 F. 2d at page 689 is here significant:

> "No one could predict when Chemurgy would be bankrupt or even that it would be insolvent. *The exact day upon which this line would be established could not have been divined except by necromancy.*" (Italics ours).

Only those who use hindsight have 20/20 vision. Roth, reasonable man though he is, possessed no occult powers; necromancy was indeed beyond him.

Without the power of divination in December, 1963, Roth, even if he had the duty to investigate (which we dispute), could not have discovered in December, 1963, the insolvency which was determined only by events occurring much much later, and only after a lengthy trial and appeal; and in an insolvency adjudica-

tion brought about by an involuntary petition filed not by any creditors of Haupt, but by three of its limited partners. (See 234 F. Supp. 168).

Appellant's assertedly "invincible" evidence was before the District Court together with all of the evidence. The District Court's finding was a reasonable interpretation thereof. We respectfully assert that for this reviewing Court to hold the District Court's finding clearly erroneous would be to ignore the rules of law applicable to a review of findings of fact.

6. Appellant Misstates the Law Respecting the Effect in the Case at Bar of the Subsequent Adjudication in Bankruptcy.

Appellant seeks to give his position a complexion of soundness by reason of the subsequent adjudication in bankruptcy.

It is axiomatic, of course, that the fact of a subsequent adjudication in bankruptcy is neither binding upon, nor admissible against, the defendant creditor in an action to set aside an allegedly preferential transfer.

In *Gratiot County Bank v. Johnson,* 249 U.S. 247, the U. S. Supreme Court laid down the principle consistently followed ever since that date, that an adjudication in bankruptcy based upon a finding in involuntary proceedings that the debtor had been insolvent for four months or more before the filing of the petition and while so insolvent had made certain preferences, is not conclusive even as against a creditor receiving payments during that period who was not a party to the proceedings and took no part therein. See also, and to like effect, *Liberty Bank v. Bear,* 265 U.S. 362.

And if such an adjudication is not determinative as against such a creditor receiving an alleged preference, even on the issue of insolvency, how conceivably can such an adjudication be any evidence that a creditor charged with receiving such a preference had reasonable cause to believe such insolvency existed at the time of payment? Appellant twists this rule of law out of shape by his arguments here.

Nor is this situation changed in anywise, as argued by appellant, by the portion of the stipulation [C. T. pp. 55-56] [R. T. pp. 10-12] reading as follows [C. T. p. 56]:

> "(4) The parties further stipulate, *merely for the purpose of enabling this Honorable Court to proceed to trial separately on said issue #1,* and without otherwise conceding the fact, that the Court may so proceed with said hearing upon the assumption that Ira Haupt & Co., and all of its general partners, were, in fact, insolvent on December 23, 1963 when the payment of attorney fees in the sum of $7,503.95 was made to Lester Wm. Roth by Ira Haupt & Co., a limited partnership.
>
> "At all other stages of this proceeding, including any trial that may ensue after the determination of issue #1, the burden of proof shall be upon plaintiff to prove the said alleged fact of insolvency."

Obviously the parties desired to have Judge Hall try first and separately and speedily said issue #1, the issue of reasonable cause to believe. But that issue could not be tried first without at least a stipulation that merely for the purpose of hearing issue #1 speedily and separately, that the Court could presume the partnership and the individual partners to have been in-

solvent. The language is crystal clear. There is of course no stipulation that Roth had reasonable cause on December 23, 1963 to believe that fact; and, there is no stipulation that investigation by Roth, if the law required investigation of him, would have resulted on December 23, 1963 in discovery of the fact.

Obviously the express provision of the same stipulation that at all other stages of this plenary suit, including the issue of insolvency, the burden of proof thereon remained with appellant, indicates that the parties by their stipulation were establishing a *modus operandi* to permit the Court to try issue #1 separately. Equally obvious such a methodology was necessary, for, absent evidence of insolvency, the issue of reasonable cause to believe could not even be tried.

7. The Appellant's Failure to Introduce Any Evidence Whatever to Prove That Appellee Had Reasonable Cause to Believe All of the Individual General Partners to Be Insolvent on December 23, 1963, Is in Any Event Fatal to This Appeal.

The separate issue #1 which by express written stipulation of the parties below, the Trial Court was to determine was this:

> "Did the defendant Lester William Roth have reasonable cause to believe that Ira Haupt & Co., a limited partnership (*and all of its general partners*) were insolvent on or about December 23, 1963 and at the time when there was paid to said Lester William Roth the sum of $7,503.95 as and for attorney's fees?" [C. T. p. 55]. (Italics ours.).

That was the issue as defined by the parties. The trustee introduced not one word of testimony suggest-

ing Roth had cause to believe that any one of the 16 general partners of Ira Haupt & Co. was insolvent on December 23, 1963 (Ruth testified that he knew only a few of these general partners of Ira Haupt & Co. & Co. and had no knowledge whatever as to their financial condition, except that those few general partners he had met appeared to be very wealthy men). [R. T. p. 36, line 25, to p. 38, line 16.]

Appellant tells us that when *he* speaks of the insolvency of the partnership Haupt this "obviously includes all of the general partners" (p. 4, lines 1-2 A.O.B.) and, says appellant: "By way of explanation when we speak of the insolvency of Ira Haupt & Co., we are obviously including the insolvency of all general partners, which this Honorable Court has said was essential in order to establish insolvency of a partnership." Thereupon appellant cites *Tom v. Sampsell,* 131 F. 2d 779, as though the principle of that case aided appellant here. Instead, we submit that case is fatal to appellant's position, as a simple reading of it shows; for, *Tom* establishes the principle of the separateness in Bankruptcy proceedings of the partnership entity from the individual partners. In *Tom,* the Court reversed the attempt made by the trustee there to lump the two. Appellant argues for a proposition which this Court rejected in *Tom.*

In this suit, the initial issue was appellee's reasonable cause to believe insolvency on the part of Haupt, a limited partnership, and insolvency on the part of all its general partners on December 23, 1963. *To have such reasonable cause to believe he must have had cause to believe that both the partnership and its general partners, as well, were then insolvent, for knowledge of*

the one, without the other, would not be sufficient. Thus, in 8 A *Corpus Juris Secundum* at page 130, we are told:

> "Knowledge of a creditor of a partnership that the partnership is insolvent, *does not charge such creditor with knowledge, or with reason to believe, that an individual partner is insolvent.*"

In his Treatise on Bankruptcy, Collier (Vol. 3—14th Edition at page 1080) affirms that proposition precisely.

In re Hull, 224 Fed. 796 (D.C. Ohio), is directly in point and follows the cited treatises precisely, for in the *Hull* case the court laid down this principle: "Knowledge of the partnership creditor that the partnership is insolvent, does not charge the creditor with knowledge that an individual partner is insolvent."

Appellant introduced not one word to indicate that Roth had reasonable cause to believe the individual general partners to be insolvent. Roth, on the other hand, offered ample proof to support his belief in their solvency. Absent any contrary proof by the trustee, the District Court properly determined Roth had no reasonable cause to believe the individual partners to be insolvent. And, in that setting, the presumption of solvency which prevails under our law, of course furnished adequate additional support for the District Court's ultimate finding of fact.

For all of the reasons here given we believe the judgment below should be affirmed.

Respectfully submitted,

CHARLES J. KATZ,
Attorney for Appellee.

Certificate.

I certify that, in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those Rules.

CHARLES J. KATZ,

No. 21,930

United States Court of Appeals

For the Ninth Circuit

WILLIAM WARD EHLERT,
Appellant,

vs.

UNITED STATES OF AMERICA,
Appellee.

BRIEF FOR APPELLANT

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No. 21,930

United States Court of Appeals

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WILLIAM WARD EHLERT,
Appellant,

vs.

UNITED STATES OF AMERICA,
Appellee.

BRIEF FOR APPELLANT

JURISDICTIONAL STATEMENT

Appellant was indicted and convicted of a violation of 50 U.S.C. Appendix § 462 for refusing to submit to induction in the Armed Forces. (Clerk's Transcript, pp. 1-2.) The District Court had jurisdiction under 18 U.S.C. § 3231. The Court of Appeals has jurisdiction under 28 U.S.C. § 1291 and 28 U.S.C. § 1294.

STATEMENT OF THE CASE

On March 3, 1964, Appellant was classified 1-A by his Local Board. (Exhibit, p. 11.) On June 16, 1964, he was ordered to report for induction on July 14, 1965. (Exhibit, p. 18.) On July 13, he wrote his Local

Board requesting conscientious objector status, stating that he had been "unable to make a decision of such moment until faced with the absolute necessity to do so." (Exhibit, p. 18.) On July 14, Appellant reported to the bus depot to which he had been ordered but refused to leave for induction, stating that he was in the process of becoming a conscientious objector. (Exhibit, p. 22.) He was referred to the assistant clerk of his Local Board who gave him an SSS Form No. 150, Special Form for Conscientious Objector. (Exhibit, p. 22.)

Appellant submitted his SSS 150 to the Board on July 26. (Exhibit, pp. 25-28.) The form contained the following information regarding religious training and belief:

> Question 2: Describe the nature of your belief . . .
>
> Answer: I believe that service in the armed forces of this country at this time is work toward the end of the destruction of the human race. I consider that my duty not to work for the destruction of the human race is superior to any duty which may arise from any human relation.
>
> Question 3: Explain how, when and from whom or from what source you received the training and acquired the belief which is the basis of your claim . . .
>
> Answer: The time period is from September, 1960, to the present. The source and the method have been the intellectual atmosphere of the University of California and its surroundings and the natural workings of an eager to know and questioning mind.

Question 4: Give the name . . . of the individual upon whom you rely most for religious guidance.

Answer: No individual more than any other.

Question 5: Under what circumstances, if any, do you believe in the use of force?

Answer: Under any circumstances in which the use of force would not make more probable the destruction of the human race.

Question 6: Describe the actions and behavior . . .

Answer: I do not believe I have any convictions which could be called religious in the sense that term is used today; that is, based upon a mythical explanation for the creation of the universe and life; requiring regular observance of ritual; acceptance of "men of the cloth" as, *per se,* superior moral and spiritual guides; and intolerance of those professing other religions.

Question 7: Have you ever given public expression . . .

Answer: No.

In addition, Appellant submitted to the Board a letter stating that

> Because of conscientiously-held beliefs which I do not consider religious in nature, I shall decline to serve in the Armed Forces. (Exhibit, p. 24.)

However, it is clear that by "religious", Appellant meant only belief based on

> a mythical explanation for the creation of the universe and life; requiring regular observance of ritual; acceptance of "men of the cloth" as,

per se, superior moral and spiritual guides; and intolerance of those professing other religions. (Exhibit, p. 26.)

On January 19, 1966, the Local Board informed Appellant that it declined to reopen his classification. (Exhibit, p. 36.) Appellant was ordered to report for induction on February 9, 1966 under authority of the induction order of June 16, 1965. (Exhibit, p. 43.)

On December 14, 1966, an indictment was filed charging Appellant with a violation of 50 U.S.C. Appendix § 462, Refusal to Submit to Induction. (C.T. p. 1.) Appellant was tried by the Court on March 29, 1967, found guilty, and on May 31, sentenced to two years imprisonment. (C.T. p. 31.)

The District Court held, inter alia, that there was no basis in fact for the Board's determination that there was no change in status beyond Appellant's control, but, following *Parrott v. U.S.,* 370 F.2d 388 (1966), held that, as a matter of law, changes in status involving conscientious objection were not beyond the control of the registrant.

SPECIFICATIONS OF ERROR

The District Court erred in holding that a factual change in status to that of conscientious objector was not legally a change in status beyond a registrant's control, within the meaning of Selective Service Regulation 1625.2, and that therefore Appellant was not denied due process by failure of the draft board to reopen and reconsider his claim for conscientious

objector status submitted after receipt of his Order to Report for Induction.

ARGUMENT

I

THE PROVISION OF SELECTIVE SERVICE REGULATION 1625.2 THAT A CLASSIFICATION MAY BE REOPENED EVEN AFTER AN ORDER TO REPORT FOR INDUCTION HAS BEEN MAILED IF A CHANGE IN A REGISTRANT'S STATUS OCCURS DUE TO CIRCUMSTANCES BEYOND A REGISTRANT'S CONTROL APPLIES TO THOSE REGISTRANTS WHO UNDERGO A CHANGE IN STATUS TO THAT OF CONSCIENTIOUS OBJECTOR DUE TO CIRCUMSTANCES BEYOND THEIR CONTROL.

Section 6(j) of the Universal Military Training and Service Act, codified as 50 U.S.C. Appendix § 456 (j) provides in part that,

> Nothing contained in this title [the Act] shall be construed to require any person to be subject to combatant training and service in the armed forces of the United States who, by reason of religious training and belief, is conscientiously opposed to participation in war in any form.

At the time of the commission of the offense for which Appellant was convicted, Section 456(j) provided an elaborate procedure for the determination of whether a registrant qualified as a conscientious objector. First, the local board reviewed the matter. If the local board denied the classification, a registrant was allowed an appeal, the Department of Justice conducted an investigation of his qualifications, and he was afforded a Department of Justice hearing.

Although the procedure for dealing with conscientious objection claims was set forth in the statute in some detail, no provision of the subsection required that claims for such status be made within a particular time, or before the happening of a particular event, such as receipt of an Order to Report for Induction.

As all details of the Selective Service System were not worked out by Congress, authority was delegated to the President to prescribe necessary rules and regulations to carry out the provisions of the Act. 50 U.S.C. Appendix § 460(b)(1). Pursuant to that authority, regulations were passed, inter alia, to provide review and reclassification by local boards when a change in circumstances indicated that a change in classification was appropriate. Selective Service Regulations 1625.1-1625.14.

Selective Service Regulations 1625.1 and 1625.2 provide for reopening and reconsideration after receipt of facts which might result in a different classification. The local board may reopen upon any set of facts, except that after an Order to Report for Induction has been mailed to a registrant, his classification cannot be reopened unless there has been a change in his status resulting from circumstances over which he had no control.

The wording of the two regulations makes it apparent that they were designed to include situations involving conscientious objector status. Regulation 1625.1(b) provides, in part, that

> Each classified registrant . . . shall . . . report to the local board in writing *any fact* that might result in the registrant being placed in a different classification such as, *but not limited to,* any change in his occupational, marital, military, or dependency status, or in his physical condition. (Emphasis added.)

Regulation 1625.2 provides, so far as is relevant here, that

> the classification of a registrant shall not be reopened after the local board has mailed to such registrant an Order to Report for Induction . . . unless the local board first specifically finds there has been a change in the registrant's status resulting from circumstances over which the registrant had no control.

Neither of the above regulations exclude facts and circumstances bearing on conscientious objector classification from the spectrum of circumstances which may be beyond a registrant's control.

To hold that conscientious objector claims are not within the proviso of Regulation 1625.2 would subvert the apparent thrust of the Universal Military Training and Service Act, for Section 456(j) sets forth a strong policy of deferment for conscientious objectors. To exclude conscientious objector claims from the proviso of Regulation 1625.2 might result in a conscientious objector having to perform combatant training and service. The first sentence of Section 456(j) specifically forbids such a construction.

Further, an exclusionary construction would result in a lack of uniformity of treatment of conscientious

objector claims. Claims may now be submitted before an Order to Report for Induction is mailed, Regulation 1625.1-1625.14. Claims may be submitted after induction. See Dept. of Defense Directive No. 1300.6 ASD(M) (August 21, 1926); Army Reg. No. 635-20 (Nov. 9, 1962); Dept. of the Navy, Bupers Instr. 1616.6 (Nov. 15, 1962); Marine Corps Order 1306.16A (Oct. 16, 1962); Air Force Reg. No. 35-24 (March 8, 1963). The armed services, however, will not consider a claim for exemption which matured prior to induction. Dept. of Defense Directive No. 1300.6. Thus, if such claims can never be asserted before the local board after an Order to Report has been sent, one who has a valid claim maturing during that time would have no remedy. This would be contrary to the "strong congressional policy to afford meticulous procedural protections to applicants who claim to be conscientious objectors . . ." *U.S. v. Gearey,* 368 F.2d 144 (1966).

The Second Circuit, in *U.S. v. Gearey,* supra, recently adopted the position urged by Appellant here: that the proviso of 1625.2 applies to conscientious objection claims maturing after receipt of an induction notice. However, language in *Parrott v. U.S.,* 370 F. 2d 388 (1966) indicates a rejection by this circuit of the Second Circuit's position in *Gearey.* The District Court held that *Gearey* was not the law of this circuit and felt constrained to follow *Parrott,* resulting in Appellant's conviction. It is Appellant's view, however, discussed in the following section, that *Gearey* and *Parrott* are not in conflict.

II

THE QUESTION OF WHETHER A PARTICULAR CHANGE IN STATUS IS DUE TO CIRCUMSTANCES BEYOND A REGISTRANT'S CONTROL IS A FACTUAL ISSUE TO BE DECIDED ON A CASE BY CASE BASIS.

U.S. v. Gearey, supra, does not hold that in all cases the assertion of conscientious objection maturing after an induction notice entitles a registrant to reconsideration and the right to a full appeal procedure. *Gearey* merely holds that the proviso of Regulation 1625.2 includes conscientious objector claims maturing after notice of induction. The Selective Service System is still charged with the obligation of making the factual determinations of when the claim matured, whether a change in status has occurred, and whether the change is from circumstances beyond control of the registrant. In fact, the Second Circuit remanded Gearey's case for just such a factual determination.

It is Appellant's belief that this Circuit, in *Parrott v. U.S.,* supra, did not reject the *Gearey* holding but merely held it inapplicable to the facts before them at that time.

In *Parrott,* appellant Lawrence had received an induction notice during the spring of the school year and had asked for a postponement until the end of the semester, which was granted by his board. Thereafter, Lawrence contended that he was a conscientious objector, testifying that his religious views did not "crystalize" until sometime in June.

The Court rejected Lawrence's *Gearey* claim as having no foundation as to maturing date in the record:

"When his religious views might have crystalized is a matter of doubt and pure speculation." *Id.* at 396.

Further, it seems apparent that this Court only intended to reject a blind acceptance of a hard and fast rule. The Court's statement that "We do not approve of the 'crystalizing' theory, unless that crystalization was the only evidence before the board", *Id.* at 396, appears to be another way of asserting that the Court accepted the *Gearey* holding, but would limit it to cases where there was no basis in fact for the board's refusal to reopen, resulting in a denial of due process.

The construction and interpretation urged by Appellant would leave to the local boards the factual determinations required by *Gearey,* while reaffirming the long standing rule that actions by local boards, including refusal to reopen, are subject to limited review by the courts applying the "no basis in fact" test. *U.S. v. Majher,* 250 F. Supp. 106 (1966, D.C. W.Va.); *U.S. v. Ransom,* 223 F.2d 15 (1955, 7 C.A.).

III

APPELLANT WAS DENIED DUE PROCESS BY THE FAILURE OF HIS LOCAL BOARD TO REOPEN HIS CASE WHEN IT HAD NO BASIS IN FACT FOR REFUSING TO DO SO.

The District Court indicated, by its statement that it would acquit were it within the Second Circuit, that it could find no basis in fact for the board's refusal to reopen. This is supported by the record.

Appellant stated explicitly to the board (Exhibit, p. 18), that he was unable to make his decision until he absolutely had to. His SSS Form 150 reflects that he had not been planning his move for a long time; the document is not the long, well articulated statement usually submitted in support of such a claim. His use of the term "religious" to refer to organized religions reflects a lack of counseling and legal assistance, Cf. *U.S. v. Seeger,* 380 U.S. 163, 85 S.Ct. 850, 13 L.ed. 2d 833 (1965). The totality of information before the board indicates a recent spontaneous decision precipitated by the receipt of the induction notice.

The question of whether the board erred in refusing to reopen should not be confused with the question of whether or not Appellant is, in fact, entitled to conscientious objector status. That question would be one to be decided upon reconsideration after reopening. The Board would be able to call Appellant in and question him and could check his references and background. Thus, it could well inform itself with a view towards making the type of in-depth determination clearly anticipated by Section 456(j) and the Regulations. But the Board did not avail themselves of these opportunities. It merely refused to reopen. On this record, that action was without merit.

Should this Court agree with Appellant and reverse, Appellant will not be exempted from the draft laws. There will be further proceedings to determine if Appellant qualifies as a conscientious objector. If he does not, he will be obligated to serve in combatant

service. If he is, he will do alternative service. In either case, a more informed, better-reasoned decision will have been reached.

CONCLUSION

For the foregoing reasons, Appellant urges the Court to reverse his conviction.

Respectfully submitted,
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ARTHUR WELLS, JR.,
Attorneys for Appellant.

CERTIFICATE

I certify that in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the U. S. Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

ARTHUR WELLS, JR.

(Appendix Follows)

Appendix

Appendix

Exhibit	Record Ref.
No. 1 (Appellant's SS File)	9